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No. 82-____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

THE IRISH PEOPLE, INC.,

*Petitioner,*

—v.—

ATTORNEY GENERAL OF THE UNITED STATES,

*Respondent.*

## PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED

1. May a federal court, in a federal question case where Congress has not provided for nationwide service of process, nevertheless assert *in personam* jurisdiction beyond the reach authorized by Fed.R.Civ.P. 4(e) and the local long-arm statutes on which it relies?

2. Does the exercise of *in personam* jurisdiction by the United States District Court for the District of Columbia over newspapers and other purveyors of First Amendment materials situated anywhere in the United States violate the Due Process Cause or the First Amendment where the only forum-related activity relied on -- in this case, receipt in the District of a total of 50 newspaper copies mailed from New York to members of Congress -- consists of the exercise of the First Amendment right to petition the government?

3. Is minimal circulation in a forum a constitutionally adequate basis for the exercise of *in personam* jurisdiction, where the defendant has no other contacts with the forum and derives at most a *de minimis* benefit from that circulation, where the defendant has not engaged in activities to purposefully avail itself of the benefits and protections of the forum state's laws, and where the forum state has no interest in adjudicating the lawsuit?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS.....2

STATEMENT OF THE CASE.....4

REASONS FOR GRANTING THE WRIT.....11

I. THE DECISION BELOW, SUSTAINING JURISDICTION IN A FEDERAL QUESTION CASE BEYOND THE LOCAL LONG-ARM LIMITS INCORPORATED BY FED. R.CIV.P. 4(e), CONFLICTS WITH UNITED STATES V. FIRST NATIONAL CITY BANK, 379 U.S. 378 (1965) AND WITH DECISIONS OF THE COURT OF APPEALS.....19

II. THE DECISION BELOW, UPHOLDING JURISDICTION NOTWITHSTANDING THE FIRST AMENDMENT BASED GOVERNMENT CONTACTS EXCEPTION TO THE D.C. LONG-ARM STATUTE, CONFLICTS WITH CONTROLLING DECISIONS OF THE D.C. COURT OF APPEALS AND PRESENTS A FEDERAL QUESTION OF EXCEPTIONAL IMPORTANCE.....30

Page

A. The Conflict With The D.C. Court of Appeals Concerning The Government Contacts Exception.....31

B. The Conflict With The D.C. Court of Appeals Concerning Whether The Government Contacts Doctrine Is Constitutionally Compelled By The First Amendment.....35

III. THE DECISION BELOW, BASING JURISDICTION SOLELY ON MINIMAL CIRCULATION IN THE FORUM, CONFLICTS WITH DECISIONS OF FOUR CIRCUITS PRECLUDING SUCH JURISDICTION ON FIRST AMENDMENT GROUNDS.....44

CONCLUSION.....49

## TABLE OF AUTHORITIES

Cases: Page

Arrowsmith v. United Press International, 320 F.2d 219 (2d Cir. 1963).....45

Barr v. United States, 478 F.2d 1152 (10th Cir. 1973).....26

Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967).....45

California Motor Transpor Co. v. Trucking Unlimited, 404 U.S. 508 (1972).....41

Cox Enterprises v. Holt, 678 F.2d 936 (11th Cir. 1982).....45, 48

Curtis Publishing v. Golino, 393 F.2d 586 (5th Cir. 1967).....48

DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (3d Cir. 1981).....25, 34

Eastern Railroad Presidents Conference v. Noerr Motor Freight, 305 U.S. 127 (1961).....40, 42

Environmental Research International, Inc. v. Lockwood Greene Engineers, Inc., 355 A.2d 808 (D.C. Cir. 1976).....passim

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).....20

Page

Feminist Women's Health Center, Inc. v. Mohammed, 586 F.2d 530 (5th Cir. 1978), cert. denied 444 U.S. 924 (1979).....41

Fandel v. Arabian American Oil Co., 345 F.2d 87 (D.C. Cir. 1965)...36

Gkiatis v. S.S. Yiosnas, 342 F. 2d 546 (4th Cir. 1965).....25

Hanna v. Plumer, 380 U.S. 460 (1965)..33

Hanson v. Denckla, 357 U.S. 235 (1958).....11, 18

Insurance Co. of Ireland v. Companie des Bauxite de Guinea, 72 L.Ed.2d 492 (1982).....29

International Shoe Co. v. Washington, 326 U.S. 310 (1945).....11

Keeton v. Hustler Magazine, Inc., 682 F.2d 33 (1st Cir. 1982).....45

Kulko v. Superior Court, 436 U.S. 84 (1978).....43

Margoles v. Johns, 483 F.2d 1212 (D.C. Cir. 1973).....36, 45

Marsh v. Kitchen, 480 F.2d 1270 (2d Cir. 1973).....25

McCabe v. Kevin Jenkins and Associates, 531 F. Supp. 648 (E.D. Pa. 1982).....45

Page

McGee v. International Life Ins. Co., 355 U.S. 220 (1957).....11

McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936).....7

Missouri v. National Organization for Women, 620 F.2d 1301 (8th Cir.), cert. denied 449 U.S. 842 (1980)...41

Moor v. County of Alameda, 411 U.S. 693 (1973).....28

Mueller Brass Co. v. Alexander Milburn Co., 152 F.2d 142 (1945).....35, 36

NAACP v. Button, 371 U.S. 415 (1963)..40

New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966).....45, 47

Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952).....27

Roaden v. Kentucky, 413 U.S. 496 (1973).....44

Rose v. Silver, 394 A.2d 1368 (D. C. 1978), reh. en banc denied, 398 A.2d 787 (1979).....23, 32, 34

SFW v. Kaiser, 647 F.2d 200 (D.C. Cir. 1981).....12, 14, 24

Shaffer v. Heitner, 433 U.S. 186 (1977).....28

Page

Siam Kraft Paper Co., Ltd. v. Parson & Whittemore, Inc., 400 F. Supp. 810 (D.D.C. 1975), aff'd. mem., 521 F.2d 324 (D.C. Cir. 1975).....36

Stafford v. Briggs, 444 U.S. 527 (1980).....passim

Terry v. Raymond International, 658 F.2d 398 (5th Cir. (1981).....20, 25, 27

Thermtron Products v. Hermansdorfer, 423 U.S. 336 (1976).....33

Traher v. DeHavilland Aircraft of Canada, Ltd., 294 F.2d 229 (1961), cert. denied, 368 U.S. 954 (1962)...36

United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967).....41

United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).....41

United States v. First National City Bank, 379 U.S. 365 (1965).....25, 26 , 27

Walker v. Armco Steel Corp., 446 U.S. 740 (1980).....20

Webber v. Michela, 633 F.2d 519 (8th Cir. 1980).....26

Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977).....26

Zurcher v. Stanford Daily, 436 U.S. 537 (1978).....44

OTHER AUTHORITIES: Page

22 U.S.C. § 611.....4, 5

28 U.S.C. § 1254(1).....1

Federal Rules of Civil Procedure

1.....19

4(d).....25

4(e).....11, 14, 23, 31

12(b)(2).....5

12(b)(3).....6

81(e).....12

2 Moore's Federal Practice (1982 ed.)

¶ 4.32[1-2].....25

¶ 4.33.....30

¶ 4.41-1[1].....25

4 Wright & Miller, Federal Practice & Procedure (1978 ed.).....

¶ 1075.....25

¶ 1114.....25

¶ 1115.....25

Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv.L.Rev. 1121 (1966).....14, 24

## OPINIONS BELOW

The opinion of the Court of Appeals, reported at 684 F.2d 928 (D.C. Cir. 1982) is set forth infra at Pet.App. 1a-58a. That opinion reviewed two separate orders of the district court, one reported (see infra at Pet.App. 59a-74a), which forms the basis for this petition, and one reported at 502 F. Supp. 63. The Court of Appeals' discussion of the jurisdictional issue raised herein appears at 684 F.2d at 932 n.9 (see infra Pet.App. 6a n.9).

## JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1) to review a judgment of the Court of Appeals for the District of Columbia Circuit entered on July 2, 1982. A timely petition for rehearing and/or rehearing en banc was denied on September 9, 1982. Pet.App. 112a-114a.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment I:

> Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment V:

> No personal shall ... be deprived of life, liberty, or property, without due process of law ....

Rule 4(e) Fed.R.Civ.P.:

> (e) Same [Summons]: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which

> the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

The District of Columbia long-arm statute, § 13-423(a), provides, in relevant part:

> Personal Jurisdiction Based Upon Conduct. A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's - (1) transacting any business in the District of Columbia ....

## STATEMENT OF THE CASE

This is a civil enforcement action brought by the Attorney General pursuant to the Foreign Agents Registration Act as amended (hereinafter "the Act" or "FARA"), 22 U.S.C. § 611 et seq., seeking an injunction to compel the defendant to register and otherwise comply with the Act. The defendant is a New York corporation whose sole business is the publication of The Irish People, a small weekly newspaper serving the Irish-American community. The Irish People is devoted to the reporting of local, national, and international events of particular interest and concern to its Irish-American readers. The newspaper is written and edited by American citizens, resident in New York, in the exercise of their right to freedom of speech and of the press. It is undisputed that they act as volunteers and

receive no compensation for their services. There is no written or oral agreement between The Irish People, Inc. or its editors and its alleged principal, the Irish Northern Aid Committee ("INAC"), a political association headquartered in New York City, and the Attorney General has never claimed otherwise.[1/]

1. The proceedings which form the basis of this petition stem from a motion to dismiss filed by the Irish People (hereafter sometimes referred to as "defendant") in 1976 under Fed.R.Civ.P. 12(b)(2)

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1/ Although the only principal of which the defendant is alleged to be an agent is a domestic political association, the Irish Northern Aid Committee headquartered in New York, the Attorney General's complaint was not statutorily deficient in that respect because the statute apparently contemplates a duty to register by an agent of a principal which is itself the agent of a foreign principal, as the Irish Northern Aid Committee has been alleged to be. See 22 U.S.C. § 611(c).

and (3), denied by the district court in early 1977.[2/]

The sole paragraph in the complaint having any connection to the District of Columbia was ¶ 3, which alleged that "Defendant is the owner and publisher of a weekly newspaper, The Irish People, which is sold and distributed within the District of Columbia." Complaint ¶ 3. The Attorney General did not predicate his complaint on District of

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2/ There have been no proceedings on the merits of the Attorney General's complaint. The case reached the Court of Appeals in 1981 on appeal from a motion to dismiss on due process grounds granted by the District Court in November, 1980. Review of the issues raised by the grounds relied on by the District Court's dismissal, extensively addressed in the Court of Appeals' decision reversing that dismissal, is not sought here, since the Court of Appeals remanded on that ground for further exploratory proceedings. The jurisdictional issue raised in this petition, on the other hand, is squarely presented, and, if decided in petitioner's favor, would terminate this litigation promptly, consistent with the values jurisdictional limitations are intended to preserve.

Columbia-related activities in any other respect nor would such activity (e.g., mailing some copies of the newspaper to congressmen at the Capitol) have been a necessary or even appropriate element of a claim under FARA. Although defendant denied ¶ 3 except to the extent that the defendant admitted that a small number of copies of The Irish People were mailed to addresses within the District of Columbia, the Attorney General made no attempt to substantiate that allegation or otherwise to support the exercise of personal jurisdiction in this district.[3/] The defendant supported its jurisdictional objection by relying on an affidavit establishing inter alia that The Irish People,

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3/ Plaintiff had the burden of proving his entitlement to in personam jurisdiction. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). See generally J. Moore, Federal Practice ¶¶ 0.60[4], 8.08[1].

is a New York corporation, resident in New York; its newspaper is printed in the New York metropolitan area (Hillside, New Jersey); The Irish People did not get advertising from, or solicit advertising from, Washington, D.C.; had no reporters or employees or officers there; was not licensed to do business there; had at no time conducted business there; did not maintain a telephone there; had no bank accounts there; had no newsstand or other wholesale distribution there; at most 55 of The Irish People's weekly press run of 13,000 copies were sent to Washington, D.C., of these approximately 50 were mailed to members of Congress, 45 of which were sent without paid subscriptions; there were "a maximum of 5 individual subscribers in the District"; and that it received at most $100 from its Washington distribution out of approx-

imate annual operating expenses in excess of $73,750. Armstrong Affidavit, Pet.App. 116a-120a.

Nevertheless, without mentioning either a controlling local rule of competence authorizing in personam jurisdiction in these circumstances, or the consistent decisions excluding contacts with the federal government from consideration as "transacting business" within the meaning of the D.C. long-arm statute for First Amendment reasons, the district court denied the motion to dismiss, relying heavily on the fifty copies provided to congressmen. Pet.App. 69a. The court also rejected defendant's argument that the First Amendment precluded predicating jurisdiction on the minimal number of copies of an out-of-state publication distributed in the District of Columbia in the absence of any other forum-related contacts or forum interests.

2. On appeal the panel summarily rejected defendant's jurisdictional appeal. Like the district court, the Court of Appeals entirely failed to address the D.C. long-arm statute, the repeated holdings of both the D.C. Court of Appeals and the United States Court of Appeals of the D.C. Circuit applying an exception for government contacts for First Amendment reasons, or the other First Amendment issues comprehensively addressed in The Irish People's brief.[4/] The panel's entire discussion of the jurisdictional issue is as follows:

> 4/ Defendant also challenges the district court's January 1977 order denying its motion

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4/ Similarly the Attorney General's discussion of the jurisdictional issue in the Court of Appeals entirely failed to address, as defendant's brief had, whether the local long-arm statute governed the jurisdictional question and whether, assuming it did, jurisdiction was authorized by that statute as construed by the local courts.

> to dismiss for lack of jurisdiction. However, we agree with the district court that sufficient contacts exist for jurisdiction to be proper here. See Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

684 F.2d at 932 n.9., Pet.App. 6.

Defendant's petition for rehearing and/or rehearing en banc was summarily denied September 9, 1982.

## REASONS FOR GRANTING THE WRIT

This case presents an unsettled question of recurring importance and continuing dispute concerning the scope of in personam long-arm jurisdiction of federal courts in federal question cases where Congress has not provided for nationwide service of process. Is that jurisdiction limited, as Rule 4(e) suggests, to cases where a state rule of competence authorizes long-arm juris-

diction and service of process to effectuate it? Or, as the Court of Appeals recently suggested in another case and apparently held below, may federal courts "disregard aspects of the state statute and state court interpretations of it that do not fit the federal frame of reference."?[5/]

Although theoretically the federal government could provide for nationwide service of process by federal courts in any jurisdiction, within the limits of any constraints imposed by the Fifth Amendment or other constitutional provisions, it has not done so for the cause of action in this case. The District of

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5/ See SFW v. Kaiser, 647 F.2d 200, 204 (D.C. Cir. 1981). The District of Columbia is a "state" for purposes of the Federal Rules of Civil Procedure. Id. at 204 n.8, citing Fed. R.Civ.P. 81(e).

Columbia has, of course, no reason to shape its long-arm statute to encompass lawsuits brought by the federal government for enforcement of federal statutory provisions against defendants throughout the United States who happen to have contacted the federal government in Washington, D.C. Accordingly, its long-arm statute has long been authoritatively construed to exclude contacts with the federal government, falling within the general scope of the First Amendment's freedom of press and of the right to petition the government for a redress of grievances, from consideration as "transacting business" within the meaning of its long-arm statute.[6/] By ignoring the local long-arm statute and the cases barring consideration of the very factors relied on below in the "transacting business"

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6/ See infra at 32 n.22, 35 n.24.

analysis, the decisions below avoided the express limitations the District of Columbia has erected to the use of its long-arm statute, even though Rule 4(e) unambiguously mandates recourse to that long-arm statute in the circumstances of this case. Nearly all other Courts of Appeals have found that Rule 4(e) bars such an end-run,[7/] regardless of the "perplexities" of its reliance on state long-arm statutes in federal question cases such as this.[8/]

Notwithstanding the Court of Appeals' evident reliance on the district court's reasoning, which failed to measure jurisdiction by the standards of the local long-arm statute as construed by the local courts, it is possible to interpret its

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7/ See infra at 25 n.16.

8/ See SFW v. Kaiser, 647 F2d at 204, quoting Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv.L.Rev. 1121, 1124 n.6 (1966).

cryptic holding in another way, as agreeing (implicitly) that a local rule of competence is required but as disagreeing either that the local statute barred jurisdiction in these circumstances, and/or that the First Amendment right to petition the government required excluding the 50 copies provided to congressmen from consideration as transacting business. Viewed this way, the Court of Appeals held that the local long-arm statute did and constitutionally could consider the First Amendment activities in the nature of petitioning the federal government in Washington, D.C. as "transacting business" sufficient to warrant being haled into court there. But that holding squarely conflicts with repeated authoritative holdings of the D.C. Court of Appeals, and indeed, with a long string of D.C. Circuit cases dating back to 1945 which the D.C. Court of

Court of Appeals has expressly approved.[9/] Moreover, read this way, the decision drastically expands the jurisdiction of the federal courts in the nation's capital; will drastically increase the susceptibility of newspapers and non-profit, public interest and advocacy groups throughout the United States to costly suit in a distant (and presumably less-than-friendly) forum solely by reason of their exercise of the right to petition; and will thereby burden the exercise of the First Amendment right to petition the government in a way Congress has never contemplated. Cf. Stafford v.

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9/ See infra at 35 n.24. Because there is no reason to believe that the local courts would seek to exercise personal jurisdiction over claims where the only business transacted consisted of First Amendment petitioning activity, assuming that they could constitutionally do so, the Court of Appeals should not have upheld jurisdiction even if it disagreed with the D.C. Court of Appeals that the government contacts exception is constitutionally compelled.

Briggs, 444 U.S. 527 (1980). A decision that the exercise of such a basic First Amendment right is equivalent to consent to be sued as the District of Columbia in a cause of action related to such petitioning activity surely merits this Court's prompt and careful attention.

Finally, the decision below conflicts with the decisions of four circuits holding that the First Amendment interest in protecting the free flow of publications must be considered in determining whether the Due Process Clause permits the exercise of jurisdiction over an out-of-state publisher, and requiring more substantial contacts than the minimal circulation in the forum which is all the plaintiff relies on here. If The Irish People is amenable to suit in the District of Columbia on the sole basis of five or even fifty-five copies, with no other forum-related contacts whatso-

ever, then nearly every newspaper in every town in the United States (and many published abroad) is amenable to suit in the nation's capital simply by reason of seeking to let the government know its opinions, and in New York or other cosmopolitan cities simply because former hometown residents create a steady, but extremely small and commercially irrelevant demand for news and opinion from afar. Although neither the First Amendment nor the Due Process Clause bars holding a publisher, like anyone else, amenable to suit where it "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws", Hanson v. Denckla, 357 U.S. 235, 253 (1958), minimal (and almost wholly unpaid) circulation in a forum without more -- in particular, without any expectation

of benefit based on its subscription payments or advertising revenues -- hardly amounts to the quantum of purposeful activity and reliance on state protection contemplated by the requirements of Due Process, especially considering the deterrent effect on First Amendment interests.

## I. THE DECISION BELOW, SUSTAINING JURISDICTION IN A FEDERAL QUESTION CASE BEYOND THE LOCAL LONG-ARM LIMITS INCORPORATED BY FED. R.CIV.P. 4(e), CONFLICTS WITH UNITED STATES v. FIRST NATIONAL CITY BANK, 379 U.S. 378 (1965) AND WITH DECISIONS OF THE COURT OF APPEALS.

By its terms, Fed.R.Civ.P. 4(e), which applies "in all suits of a civil nature" in federal court,[10/] permits

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10/ Fed.R.Civ.P. 1. Rule 1 provides that the federal rules "govern the procedure" in all cases in federal courts without distinction. The Court has never held a federal rule inapplicable even in diversity cases governed by Erie
(footnote continued on following page)

permits federal courts to assert personal jurisdiction over defendants in civil cases only when authorized by "a statute of the United States or an order of court thereunder", or by "a statute or rule of court of the state in which the district court is held." Because there is no federal statute arguably governing service in this case, Rule 4(e) permits jurisdiction here only if authorized by a local long-arm statute.

But decisions of the D.C. Court of Appeals make clear that the only transaction of business from which the Attor-

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(footnote continued from preceding page) Railroad Co. v. Tompkins, 304 U.S. 64 (1938). See Walker v. Armco Steel Corp., 446 U.S. 740, 747-48 (1980). A fortiorari, it has never indicated that any of the rules applies in diversity cases but not in federal question cases. To our knowledge, the only Courts of Appeals to have so ruled are the D.C. Circuit's implicit holding in this case, and the Fifth Circuit's identical decision in Terry v. Raymond International, 658 F.2d 398 (5th Cir. 1981), discussed infra at 25 n.15.

ney General's claim in this case is asserted to arise -- the sending of 50 copies of The Irish People to members of Congress[11/] -- cannot be considered as transacting business within the meaning of § 13-423(a)(1).[12/] This is so because

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11/ Although the record establishes a small additional quantum of activity in the forum by The Irish People, Inc. -- an additional five copies regularly sent to paying subscribers -- the Attorney General has not claimed, and could not, that this case arises from that activity. See Plaintiff's Statement of Points and Authorities, reprinted in the Appendix filed in the Court of Appeals (hereafter "A.") at 36; see also Reply Brief for the Plaintiff-Appellant at 14-15 (relying solely on the fifty copies per week directed to members of Congress.)

12/ The only provision of the D.C. long-arm statute on which jurisdiction could conceivably be based is § 13-423(a)(1), which authorizes in personam jurisdiction in this case only "as to a claim for relief arising from the [defendant's] ... transacting any business in the District of Columbia." § 13-423(a)(1).

the government contacts doctrine which provides that "entry into the District of Columbia by nonresidents for the purpose of contacting federal government agencies is not a basis for the assertion of in personam jurisdiction." Environmental Research International, Inc. v. Lockwood Greene Engineers, Inc., 355 A.2d 808, 816 (D.C. Cir. 1976) (en banc) (hereafter Lockwood Greene).[13/]

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13/ As the D.C. Court of Appeals explained in Lockwood Greene:

> The rationale for the "government contacts" exception to the District of Columbia's long arm statute ... finds its source in the unique character of the District as the seat of national government and in the correlative need for unfettered access to federal departments and agencies for the entire national citizenry. To permit our local courts to assert personal jurisdiction over nonresidents whose sole contact with the District consists of dealing with a federal instrumentality not only would pose a threat to free public participa-

(footnote continued on following page)

Accordingly, in personam jurisdiction was proper in this case only if, notwithstanding the failure of the local long-arm statute to authorize jurisdiction in these circumstances, the federal court has inherent power to step outside the confines of Rule 4(e) and to exercise in personam jurisdiction to the limits of the Fifth Amendment. The D.C. Circuit's recent indications in other cases and apparent holding in this case that it

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(footnote continued from preceding page)
tion in government, but also would threaten to convert the District of Columbia into a national judicial forum.

355 A.2d at 813. See also Rose v. Silver, 394 A.2d 1368, 1374 (D.C. 1978), reh. en banc denied, 398 A.2d 787 (1979) (First Amendment rationale, including right to petition, for government contacts doctrine).

believes such power exists[14] and the Fifth Circuit's recent decision to the

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14/ In SFW v. Kaiser, 647 F.2d 200, 204 (D.C. Cir. 1981), the Court observed:

> We note that in this case involving alien defendants and some federal claims, application of the local long-arm statute "produce[s] perplexities" since the statute was drafted from the point of view of the District community, not from the perspective of the nation as a whole. Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv.L.Rev. 1121, 1124 n.6 (1966). Under these circumstances, it might be appropriate for the federal courts to disregard aspects of the state statute and state court interpretations of it that do not fit the federal frame of reference. See id. at 1125 n.6. We need not take that step in this case, however ....

Here, although the D.C. Court of Appeals' government contacts decisions were brought to its attention, the D.C. Circuit wholly ignored them, predicating jurisdiction without reference to the local long-arm statute and relying on the district court opinion which had similarly ignored the existence of any local rule of competence. See infra Pet.App. 59a-69a.

same effect,[15] stand in direct conflict with the plain impact of this Court's decision in United States v. First National City Bank, 379 U.S. 365 (1965), and decisions of six Courts of Appeals which have held that there is no such power.[16]

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15/ In Terry v. Raymond International, Inc., 658 F.2d 398 (5th Cir. 1981), the Fifth Circuit held that personal jurisdiction over an out-of-state defendant in a federal action based not wholly on diversity does not depend on the amenability of the defendant to suit under a state long-arm statute. The Court reached this result by relying solely on Rule 4(d)(7), which permits (in-state) service "in the manner prescribed by the law of the state in which the district court was held" and by ignoring Rule 4(e), which authorizes out-of-state service only "under the circumstances and in the manner prescribed" by a state statute. As leading commentators have long observed, the Fifth Circuit's analysis is simply wrong. See 4 Wright & Miller Federal Practice & Procedure ¶¶ 1075, 1114, 1115 (1978 ed.); 2 Moore's Federal Practice ¶¶ 4.32[1-2], 4.41-1[1] (1982 ed.)

16/ See, e.g., Marsh v. Kitchen, 480 F. 2d 1270 (2nd Cir. 1973); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (3rd Cir. 1981); Gkiafis v. S.S. Yiosnas, 342 F.2d 546 (4th Cir. 1965); (footnote continued on following page)

In United States v. First National City Bank, supra, a federal question case, this Court's decision that a bank could be enjoined from transferring assets of a non-party taxpayer was based on its determination that the taxpayer was amenable to the jurisdiction of the district court. In making that determination, the Court exclusively on Rule 4(e) and the long-arm statute of the state where the district court sat. 379 U.S. at 381-83; see also id. at 390 (Harlan, J., dissenting). That reliance, unquestioned by any member of the Court, and the failure of the Court to attempt to justify jurisdiction on a federal basis independent of the state long-arm

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(footnote continued from preceding page) Webber v. Michela, 633 F.2d 519 (8th Cir. 1980); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977); Barr v. United States, 478 F.2d 1152 (10th Cir. 1973). The other five circuits do not appear to have decided the question.

statute which would have avoided the difficult assumptions regarding New York law on which the Court was forced to rely, stand in direct conflict with the decisions below, predicating personal jurisdiction to the limits of due process regardless of the absence of a federal statute authorizing such service and of express limitations in governing state long-arm statutes.[17/]

The conflict between the decision below and the Fifth Circuit's decision in Terry, on the one hand, and First National City Bank, the decisions of six circuits, and the views of leading commentators, on the other,[18/] raises an

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17/ In Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 440-41 (1952), this Court noted that states have no obligation to extend their rules of competence to the limits of due process.

18/ See supra 25 n.15.

issue of fundamental importance. Federal courts are, axiomatically, courts of limited jurisdiction. This Court has zealously policed the jurisdictional limitations Congress imposed, declining to uphold, for example, the exercise of judicial power to add pendant parties as to whom no basis for federal jurisdiction exists. See, e.g., Moor v. County of Alameda, 411 U.S. 693 (1973). Moreover, the Court has stressed that the personal liberty protected by due process limitations on in personam jurisdiction should be infringed only after legislative -- not merely judicial -- decision to do so. See, e.g., Shaffer v. Heitner, 433 U.S. 186, 214-16 (1977). Cf. Stafford v. Briggs, 444 U.S. 522, 545 (1980) (stressing need for clear statement by Congress before Court will

exceed traditional venue requirements).[19/]

Were the theory relied on below and in the Fifth Circuit adopted, the basic two-fold requirement followed by all American jurisdictions that in personam jurisdiction be both statutorily authorized and within constitutional limits would be fundamentally altered. The only test would be one of constitutional power. Federal courts would exercise in personam jurisdiction over any defendant with "minimum contacts" with the sovereign -- i.e., with the United States;

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19/ Insurance Co. of Ireland v. Companie des Bauxite de Guinea, 72 L.Ed.2d 492 (1982) is not to the contrary. Assuming that the facts were as plaintiff alleged, the legislature had authorized jurisdiction, and the facts were deemed admitted under sanctions approved by Congress through the Rules Enabling Act under a theory of "constructive waiver" or "presumption" of jurisdiction. That theory, of course, is unavailable to plaintiff here.

the only meaningful restraints on a court's power to summon a defendant in a federal question case would be the venue requirements; and a host of federal statutes expressly providing for nationwide service of process would be rendered superfluous.[20/] Certiorari should issue to review and reverse the judgment below.

## II. THE DECISION BELOW, UPHOLDING JURISDICTION NOTWITHSTANDING THE FIRST AMENDMENT BASED GOVERNMENT CONTACTS EXCEPTION TO THE D.C. LONG-ARM STATUTE, CONFLICTS WITH CONTROLLING DECISIONS OF THE D.C. COURT OF APPEALS AND PRESENTS A FEDERAL QUESTION OF EXCEPTIONAL IMPORTANCE.

Because the decision below resolved the jurisdictional question so cryptically, it is impossible to be sure quite what theory it relied on. If, contrary to our submission above, the court did not rely on an inherent district court

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20/ See 2 Moore's Federal Practice ¶ 4.33 (1982 ed.)

power to exercise in personam jurisdiction in federal question cases despite the limitations of Rule 4(e), then it must have decided that the D.C. long-arm statute does, and constitutionally can, consider the 50 newspaper copies provided to congressmen as sufficient "transacting business" to satisfy both statutory and constitutional requirements. If that is the court's holding it conflicts squarely with controlling statutory decisions of the D.C. Court of Appeals, and presents a federal question bearing on the administration of justice in the federal courts in the nation's capital of exceeding importance.

### A. The Conflict With The D.C. Court Of Appeals Concerning The Government Contacts Exception.

The conflict between the decision to uphold jurisdiction here based on the sole claim-related activity of

mailing 50 copies of The Irish People to congressmen at the Capitol [21] and applicable decisions of the D.C. Court of Appeals could hardly be plainer.[22] That decision represents such a departure from the obligation to follow those

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21/ As demonstrated supra at n.21 n.11, the Attorney General has made no assertion that his claim "arises from" the additional five copies sent to individual subscribers in the District. Such a claim would grotesquely expand the jurisdiction (and venue) applicable to FARA claims, giving the Attorney General a choice of any forum in the nation for any FARA claim where a newspaper or other communication had been distributed. There is, of course, no indication that Congress ever suggested a result with such potential for harrassment. Cf. Stafford v. Briggs, supra.

22/ See, e.g., Lockwood Greene, supra, 355 A.2d at 813-16; Rose v. Silver, 394 A.2d 1368 (D.C. 1978), reh. en banc denied, 398 A.2d 787 (D.C. 1979); and the federal cases cited with approval in Lockwood Greene, 355 A.2d at 813 n.9.

decisions in these circumstances as to call for this court's supervisory review. See, e.g., Thermtron Products v. Hermansdorfer, 423 U.S. 336 (1976); Hanna v. Plumer, 380 U.S. 460 (1965). This is not simply a conflict concerning a fine point of state law; instead, the D.C. Circuit has boldly ignored the local law Rule 4(e) obligates it to apply, namely the local long-arm statute with its repeatedly affirmed government contacts exception. Moreover, it has done so because of that court's apparent disagreement with the policy behind the doctrine, that permitting "our local courts to assert personal jurisdiction over nonresidents whose sole contact with the District consists of dealing with a federal instrumentality ... would threaten to convert the District of Columbia into a national

forum."[23/] Cf. De James v. Magnificance Carriers, Inc., 654 F.2d at 284 (noting incongruity of limiting in personam jurisdiction in admiralty case to Fourteenth Amendment due process constraints applicable to forum state's long-arm statute, but observing that Congress is free to rectify the anomaly by authorization for nationwide service of process). There should be no confusion concerning the duty of the federal courts strictly to apply established local long-arm law in cases where Rule 4(e) adopts that law. This case presents the Court with appropriate occasion for reaffirming that duty.

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23/ Lockwood Greene, 355 A.2d at 813. The D.C. Circuit's opposition to that policy is particularly inappropriate here, since Congress has not designated the federal courts in Washington, D.C. as an exclusive or always-permissible forum for FARA actions, a course it is perfectly capable of following where it sees the need to do so. See, e.g., 47 U.S.C. §§ 402, 504; 42 U.S.C. § 1973c; 28 U.S.C. 2343.

B. The Conflict With The D.C. Court Of Appeals Concerning Whether The Government Contacts Doctrine Is Constitutionally Compelled By The First Amendment.

The judgment below necessarily (albeit implicitly) held that the government contacts doctrine is not required by the First Amendment. That holding stands in sharp conflict with the D.C. Court of Appeals' decisions that the government contacts exception is constitutionally required to avert "a threat to free public participation in government." Lockwood Greene, 355 A.2d at 813; see also id. at n.11.[24/]

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24/ As the Court subsequently explained in Rose v. Silver, 394 A.2d 1368, 1374 (D.C. 1978) (contact with FDA), the exception is necessary to "protec[t] one's right to petition the government for a redress of grievances, without fear of the threat of suit if their contacts were limited to asserting that constitutional right." For cases applying the doctrine, see, e.g., Lockwood Greene, supra (entering the District to confer with the EPA); Mueller Brass Co. v. Alexander Milburn

(footnote continued on following page)

Like the First Amendment-based newsgathering exception to the local jurisdictional statutes from which the government contacts exception has grown,[25] the government contacts doctrine prevents those who maintain contacts in

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(footnote continued from preceding page) Co., 152 F.2d 142, 143 (1945) ("gathering information from Government departments and agencies"); Traher v. De Havilland Aircraft of Canada, Ltd., 294 F.2d 229 (1961), cert. denied, 368 U.S. 954 (1962) (contact with government and armed forces); Fandel v. Arabian American Oil Co., 345 F.2d 87 (D.C. Cir. 1965) (contact with State Department); Margoles v. Johns, 483 F.2d 1212 (D.C. Cir. 1973) (maintenance of reporters in district for newsgathering); Siam Kraft Paper Co., Ltd. v. Parson & Whittemore, Inc., 400 F. Supp. 810 (D.D.C. 1975) (taking advantage of services offered to foreign investors by government agencies), aff'd mem., 521 F.2d 324 (D.C. Cir. 1975). Each of these cases has been cited with approval by the District of Columbia Court of Appeals. See Lockwood Greene, 355 A.2d at 813 n.9.

25/ See Mueller Brass Co. v. Alexander Milburn Co., supra, 152 F.2d at 143-44.

the District solely for First Amendment reasons and who transact no other business here from consenting ipso facto to being sued here. It is based

> in the unique character of the District as the seat of national government and in the correlative need for unfettered access to federal departments and agencies for the entire national citizenry.

Lockwood Greene, 355 A.2d at 813.

Resolution of the conflict between that principle and the judgment below is vital because leaving the judgment below intact will severely impact First Amendment rights and interests of citizens seeking to give advice to the government, or to receive information or to seek relief from it. This Court has recently canvassed the burdens of forcing litigants to defend civil lawsuits "in distant districts", Stafford v. Briggs, supra, holding that Congress should not be held to have done so

without a clear statement of such intent. The burdens found significant in Stafford, however, where the government had undertaken to represent former-official defendants in lawsuits based on their actions while in office, pale in comparison with those the judgment below will place on all those, including newspapers, non-profit associations of diverse sorts, and even states, whose sole presence here consists of speaking with the federal government and who will be forced to engage and pay for D.C. counsel (often at rates far exceeding rates in distant localities) to defend lawsuits brought here under the D.C. Circuit's insupportable decision. Moreover, the jurisdiction of the federal courts would drastically expand: any contact with Congress, a federal agency, or the Executive branch will henceforth subject a distant citizen to civil suit

here on a related claim, despite congressional refusal to designate the District of Columbia as available forum in all civil cases involving the federal government's Washington, D.C. operations. Such a result is wholly inconsistent with Congress' decision to permit such groups to sue the government for review of governmental actions in their own places of residence, and to free them from having to bring suits in Washington, D.C. Stafford v. Briggs, supra. Congress would hardly have waived sovereign immunity to be sued in distant locales on grounds of fairness to private plaintiffs, while requiring citizens to shoulder the burden of defending at the government's convenience in Washington, D.C. every action in which their contacts with the government at the nation's capital, no matter how minimal, are involved. Moreover,

with particular respect to FARA actions, the decision below permits the government to oppress any person alleged to be a foreign agent who has influenced (or attempted to influence) the government in Washington, D.C. by suing him or her here, regardless of the burden of such distant suit or congressional failure to designate the District of Columbia as an exclusive or available forum in all FARA cases.

This Court has frequently recognized that the First Amendment right to petition every branch of the government is entitled to the most rigorous protection from undue governmental restrictions, and that this right in particular "needs breathing space to survive." NAACP v. Button, 371 U.S. 415, 433 (1963); see also Eastern Railroad Presidents Conference v. Noerr Motor Freight, 305 U.S. 127, 137

(1961); United Mine Workers v. Illinois State Bar Association, 389 U.S. 217, 222 (1967). Although Noerr Motor's holding that petitioning activity cannot be the basis for antitrust liability regardless of intent was cast in statutory terms, it was strongly influenced by constitutional doctrine, and both this Court[26/] and other courts[27/] have derived from it a broad principle that civil liability can never constitutionally be predicated on petitioning activity, regardless of intent.

Even if the compelling interest

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26/ United Mine Workers of America v. Pennington, 381 U.S. 657, 679 (1965); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

27/ See, e.g., Missouri v. National Organization for Women, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980); Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978), cert. denied 444 U.S. 924 (1979).

test were applicable here, rather than the "no liability" principle based on Noerr, there is simply nothing resembling a compelling reason for this defendant (or others whose sole contact with the District is activity protected by the right to petition) to defend federal statutory cases in every district where they exercised First Amendment rights concerning the statute.

If the right to petition is viewed not as an independent reason not to permit jurisdiction under these circumstances but rather as one of the considerations of reasonableness and fairness which are subsumed under the due process analysis, the result is the same. There is no sense in whch The Irish People, or anyone else whose sole contact consists of contacting the federal government, has availed itself of the benefits and protections of the local

forum's laws. The point is seen most clearly by the facts here, since The Irish People could as easily have sent the copies to the congressmen at their district offices rather than in the Capitol. That The Irish People, Inc. or any other entity engaging in petitioning communications happen to have sent their publications to one address rather than another does not create an interest in either local forum -- Washington, D.C. or a congressman's home district -- in adjudicating a statutory obligation such as arises in this case. Cf. Kulko v. Superior Court, 436 U.S. 84 (1978) (letter sent to forum state insufficient basis for jursidiction where no other contacts or forum interests present).

In short, whether it is viewed as a right stemming directly from the First Amendment or as a part of due

process analysis informed, as circumstances require, by First Amendment considerations, see, e.g., Zurcher v. Stanford Daily, 436 U.S. 537 (1978); Roaden v. Kentucky, 413 U.S. 496, 504 (1973), the government contacts doctrine is constitutionally required to avoid undue burdens on First Amendment rights. The Court of Appeals' judgment, which ignores these considerations, should be reviewed and reversed.

## III. THE DECISION BELOW, BASING JURISDICTION SOLELY ON MINIMAL CIRCULATION IN THE FORUM, CONFLICTS WITH DECISIONS OF FOUR CIRCUITS PRECLUDING SUCH JURISDICTION ON FIRST AMENDMENT GROUNDS.

The decision below also conflicts with decisions of four circuits holding that the First Amendment interest in protecting the free flow of publications must be considered in determining whether the Fourteenth Amendment permits the ex-

ercise of personal jurisdiction over an out-of-state publisher, and requiring more than the minimal circulation in the forum which is all plaintiff relies on here.[28/] If The Irish People is amenable to this FARA action by the Attorney

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28/ See Keeton v. Hustler Magazine, Inc., 682 F.2d 33 (1st Cir. 1982); Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967); New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966); Cox Enterprises v. Holt, 678 F.2d 936 (11th Cir. 1982). See also McCabe v. Kevin Jenkins and Associates, 531 F. Supp. 648 (E.D. Pa. 1982). Without express mention of the doctrine, the D.C. Circuit had previously affirmed a lower court decision applying it. Margoles v. Johns, 333 F. Supp. 942, 946 (D.D.C. 1971), aff'd., 483 F.2d 1212 (D.C. Cir. 1973).

Although the Second Circuit in Buckley approved the doctrine, it held, on the facts of that case, that jurisdiction over the New York Post in Connecticut was permissible. See also Arrowsmith v. United Press International, 320 F.2d 219 (2d Cir. 1963).

General solely by reasons of five or even fifty-five copies distributed in this district, then nearly any publisher who distributes a publication here even on an extremely limited basis, and every organization which sends books, leaflets or other publications to members of Congress or officials in the Executive branch in limited numbers in the District, can be haled into the District of Columbia on nearly any cause of action related to such publications. Moreover, the same First Amendment problem exists with the wide range of newspapers and other publications from literally thousands of communities and organizations throughout the nation (and indeed, well beyond) which are sent in extremely limited numbers to distant forums without expectation of substantial commercial gain, merely because of the cosmopolitan nature of the populace,

or the nature of the work they engage in. In our judgment, it is inconceivable that the First Amendment, or this Court, would have permitted the government to choose to assert in personam jurisdiction in The Pentagon Papers cases in any community in the United States where 55 copies of the New York Times, the Washington Post or the Boston Globe were distributed; or that the Sacramento Bee or Le Monde are amenable to suit in New York merely because a few dozen former residents of California or Paris residing in New York receive those papers there.

If in personam jurisdiction is held constitutionally present in this case, the burden on and consequent risk of chill to the widest possible dissemination of information would be severe. See generally New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966).

Where, as here, a newspaper or other purveyor of First Amendment material is not shown to have made any "effort to exploit or penetrate the state market beyond making the paper available to a few readers in the state who may have an interest in it", Holt, supra, 678 F.2d at 939, or to have either solicited advertising or sought to profit from its national advertisers by maximizing circulation generally,[29/] and has no other contacts with the forum,

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29/ In Curtis Publishing Co. v. Golino, 393 F.2d 586 (5th Cir. 1967) the Fifth Circuit upheld jurisdiction on this ground. The district court below erroneously attempted to analogize the facts of this case to Golino (Pet. App. 66a-68a) but Golino is inapposite. Unlike the national magazine at issue there, The Irish People has no incentive based on the nature of its advertisers or its financial arrangements with them to increase its share of or exploit the District of Columbia market and has not in fact attempted to do so.

First Amendment interests have been found by four circuits, and should be held by this Court, to preclude the exercise of *in personam* jurisdiction.

## CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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Date: November 23, 1982

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 81-1035

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, APPELLANT

v.

THE IRISH PEOPLE, INC., APPELLEE

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Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 76-01518)

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Argued 21 October 1981

Decided 2 July 1982

Judgment entered this date ←

*Brian K. Ahearn*, Attorney, Department of Justice, with whom *John C. Keeney*, Acting Assistant Attorney

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

General, *John L. Martin* and *Joseph E. Clarkson*, Attorneys, Department of Justice, were on the brief for appellant.

*Charles S. Sims*, with whom *Helene M. Freeman* and *Mark Lynch* were on the brief for appellee.

Before: BAZELON, *Senior Circuit Judge*, and WILKEY and WALD, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKEY.

Separate opinion for the Court filed by *Circuit Judge* WALD.

Concurring opinion filed by *Senior Circuit Judge* BAZELON.

PER CURIAM: Judge Wilkey files an opinion in which Judge Wald and Senior Judge Bazelon concur, except with respect to Part II, A (entitled "Lack of Improper Motivation"). Judge Wald files a separate opinion in which Senior Judge Bazelon concurs. Judge Wald's opinion, and Judge Wilkey's opinion, except for Part II, A, together constitute the opinion of the court. The district court's order is reversed and the case remanded for further proceedings consistent with the opinion of the court.

*So Ordered.*

WILKEY, *Circuit Judge*: The Attorney General of the United States, plaintiff/appellant, initiated this suit under the Foreign Agents Registration Act[1] ("FARA" or "the Act") to compel defendant/appellee, publisher of the newspaper *The Irish People*, to register under the Act. The district court ruled that certain documents requested by the defense from plaintiff were state secrets, as the Attorney General claimed, but that defendant had established a need for discovery of the documents in order to pursue the selective prosecution defense it had raised. The court therefore concluded that since the Attorney General chose not to surrender the material to the defendant the action had to be dismissed.

We reverse because we find that neither element necessary for a selective prosecution defense was sufficiently demonstrated by the district court's opinion for the defendant to be entitled to discovery on the issue. We also caution that on remand, even if a colorable selective prosecution claim is ultimately demonstrated to exist, outright dismissal may be too extreme a measure to invoke for plaintiff's inability to comply with defendant's discovery request.

## I. BACKGROUND

On 16 August 1976 the Attorney General filed this complaint seeking a mandatory injunction requiring defendant, a New York corporation and publisher of the weekly newspaper *The Irish People*, to register with his office as required by FARA. The Act requires that, with certain exceptions, anyone acting as an agent of a foreign principal register with and make certain disclosures to the Attorney General. The main allegations of the suit are that the defendant is controlled and partially

[1] 22 U.S.C. §§ 611-621 (1976). The specific provision under which this action is brought is *id.* § 618(f).

financed by the Irish Northern Aid Committee (INAC), an admitted agent of a foreign principal, and that the defendant in turn is a means to garner support for INAC and its principal, the Irish Republican Army (IRA).[2] The defendant has denied these allegations and has raised a series of affirmative defenses including selective prosecution. Specifically, the defendant claims that it was improperly singled out for registration under FARA, not as a matter of legitimate discretion, but rather "because of hostility to the editorial policy of defendant, and the [Irish Republican] cause it espouses,"[3] and as a result of pressure from the British and perhaps the Irish governments.

Beginning in January 1978 *The Irish People* engaged in extensive efforts to secure production and discovery of information and documents it claimed to be relevant to its factual exculpation and legal defenses. Eventually, after various interim orders and extensive briefing by the parties, the parties joined issue over the documents which the Attorney General sought to shield from discovery as state secrets. In the meantime the Attorney General had furnished a large number of other documents.

By a memorandum opinion of 13 July 1979[4] the district court held that the state secrets privilege did apply, and denied defendant access to the privileged material.

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[2] In its FARA registration INAC has identified its foreign principal as the "Northern Aid Committee." However, in a case decided by the United States District Court for the Southern District of New York, *Attorney Gen.* v. *INAC*, No. 77 Civ. 708-CSH (S.D.N.Y. 30 Apr. 1981), and affirmed by the Second Circuit, No. 81-6141 (2d Cir. 5 Jan. 1982), it was held that the true foreign principal of INAC is the Irish Republican Army, an organization generally characterized as terrorist.

[3] Defendant's Answer, Joint Appendix (J.A.) at 6-7.

[4] Docket No. 76-1518, J.A. at 47.

On the basis of this denial, the defendant next moved for the dismissal of the Attorney General's cause of action, asserting that without access to the privileged material the defendant could not adequately pursue its defense of selective prosecution and that the Attorney General, by successfully invoking the privilege, was now precluded from seeking a mandatory injunction requiring defendant to comply with FARA. Defendant argued that "fair adjudication . . . has been rendered impossible by the government's assertion of a claim of state secrets privilege to withhold relevant evidence necessary for the defense." [5]

After considering the arguments of the parties, the district court found that the defendant had established a need for the privileged material in order to pursue the selective prosecution defense and that the plaintiff had to surrender the material to the defendant or the action would be dismissed.[6] The plaintiff moved for reconsideration, arguing that neither the circumstances nor the applicable law warranted such a dismissal. The district court denied the motion for reconsideration and granted defendant's motion to dismiss.[7]

We reverse. The opinion by the district court adequately demonstrated neither of the two elements necessary for a selective prosecution—*improper motivation* and *selection* by the Government.[8] Moreover, in any event out-

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[5] Defendant's Motion to Dismiss, J.A. at 55.

[6] Memorandum opinion (mem. op.), No. 76-1518 (D.D.C. 8 Aug. 1980), J.A. at 112.

[7] Order, No. 76-1518 (D.D.C. 6 Nov. 1980), J.A. at 136.

[8] Because we conclude that the findings of the district court demonstrate not even a *colorable showing* of selective prosecution, reversal is proper whether or not the showing which a defendant must make to obtain discovery differs from the showing it must make at trial to establish a *prima facie case* of selective prosecution. *See United States* v. *Diggs*, 613 F.2d 988, 1003 n.87 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980). However, because this determination will likely con-

right dismissal may have been too extreme a measure for the district court to invoke. We discuss these two findings in turn.[9]

## II. The Selective Prosecution Claim

As we held in *United States* v. *Diggs*,[10] a defendant alleging or invoking the selective prosecution defense, even at the discovery stage, must offer at least a colorable claim *both* that the prosecution was improperly moti-

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front the district court on remand if it continues its inquiry into whether there has been a sufficient showing by defendant, we find further at this time that defendant in fact need make only a colorable showing of each prong of the defense in order to be entitled to discovery. This or something like it seems to be the rule in most other circuits which have reached this issue. *See United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974) (" 'colorable basis' "); *United States* v. *Berrigan*, 482 F.2d 171, 177 (3d Cir. 1973) ("colorable basis"); *United States* v. *Falk*, 479 F.2d 616, 620-21 (7th Cir. 1973) (en banc) ("facts sufficient to raise a reasonable doubt about the prosecutor's purpose"). *But see United States* v. *Johnson*, 577 F.2d 1304, 1309 (5th Cir. 1978) (prima facie showing required for discovery). Note that this entitlement does not necessarily mean that dismissal is proper should compliance with discovery be impossible. *See* pp. 41-54 ("III. The Improper Dismissal Issue") *infra*.

We need not reach the question of to what extent the selective prosecution defense may be inappropriate in a civil suit context, though we do hold that when the interests of the parties in the suit must be balanced, the civil or criminal nature of the case is important. *See* note 25 and pp. 41-54 ("The Improper Dismissal Issue") *infra*.

[9] Defendant also challenges the district court's 4 January 1977 order denying its motion to dismiss for lack of jurisdiction. However, we agree with the district court that sufficient contacts exist for jurisdiction to be proper here. *See Hansen* v. *Denkla*, 357 U.S. 235 (1958); *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

[10] 613 F.2d 988, 1003-04 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980).

vated *and* that it was selective in the first place.[11] In the case at hand, however, the district court's opinion does not indicate that defendant has done either.

A. *Lack of Improper Motivation*

1. *Overview*

The district court found, first, that defendant had established "entitlement to discovery relating to the de-

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[11] Other cases supporting this two-part approach are discussed at pp. 34-41 ("II.B *Lack of Selection*") *infra*. We also note that this analysis was employed by Judge Haight in proceedings related to this one. *Attorney Gen.* v. *INAC*, No. 77 Civ. 708-CSH (S.D.N.Y. 30 Apr. 1981), *aff'd*, No. 81-6141 (2d Cir. 5 Jan. 1982). INAC—the alleged principal in our case—invoked a selective prosecution defense when the Attorney General sought to compel it to register under FARA as an agent of the IRA. Judge Haight held:

> Selectivity alone does not render prosecution unlawful, *Oyler* v. *Boles*, 368 U.S. 448, 455-56 (1962); *Moss* v. *Hornig*, 314 F.2d 89 (2d Cir. 1963); rather, to be unlawful, the decision to prosecute must be predicated on some unjustifiable standard. *Oyler*, *supra*, 368 U.S. at 456; *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *United States* v. *Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972) (prosecution unlawful if it is an act of discrimination against those who exercise their First Amendment rights). The party raising the defense of selective prosecution "bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). If the defendant establishes a *prima facie* case, the burden shifts to the government to prove that the prosecution did not arise from discriminatory motives. *Id.* at 1212 n.4 and cases cited therein.

*Id.*, mem. op. and order at 19.

Judge Haight ultimately ruled in favor of the Attorney General on all issues, including the selective prosecution defense.

fense of selective prosecution" and, second, that "the particular documents that the defendant seeks to discover are sufficiently related to that defense to justify compelling the government to release them." [12]

All three judges on this panel are agreed that the district court must reconsider both findings. We are agreed that the evidence cited by the district court did not entitle defendant to discovery since it did not demonstrate a colorable showing of improper motivation, and that—even if such a showing were made—the documents in question may not be sufficiently relevant to the defense to justify their discovery.[13]

The district court listed the reasons for its conclusion that the defendant had established entitlement to discovery on the selective prosecution issue as follows:

> [T]he court is satisfied that regardless of the test applied—reasonable doubt, colorable basis, beyond frivolous, evidence tending to show essential elements —the defendant has carried his burden. Particularly significant is the January 30, 1980 deposition of Mr. Dennis Dickson, a former F.B.I. Legal Attache stationed with the American Embassy in London. Dickson indicated that the United States Department was at one time "getting various requests from the Government of Ireland as to what the U.S. was doing to prosecute individuals that were shipping guns, ammunition, that was in violation of the Registration Act. . . ." Dickson Deposition at 50. He confirmed that at a meeting convened by the State Department, *id.*, apparently on September 26, 1973, *id.* at 47, there was discussion of means of alleviating *political* as well as financial and military support furnished by [sic] Irish militants by U.S. citizens, *id.* at 52-53. In view of these and other statements in the Dennis

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[12] Mem. op. at 5, J.A. at 116.

[13] *See* Opinion of Wald, J.

> Deposition, it would be unreasonable to deny the requested discovery.[14]

The district court then turned to whether the documents defendant sought, which the court had earlier ruled to be state secrets, would bear on whether the Attorney General was improperly motivated. The court quoted *United States* v. *Reynolds* [15] in concluding that dismissal would be proper if the Government had "invoke[d] its governmental privileges to deprive the accused of anything which *might be material* to his defense." [16]

Having examined each of the documents in camera, Judge Flannery then concluded:

> There is a manifest likelihood that documents reflecting communications between agencies of the Irish and British governments and agencies of the United States would shed considerable light on the existence *vel non* of at least one unlawful basis for the present prosecution. Indeed, as this court stated earlier in this case, "The defendant in the case *sub judice* has argued persuasively that proof of the existence of communications between agencies of the British or Irish governments and American agencies is crucial to its defense of selective prosecution. . . ." [17]

The district court apparently concluded that something which "might be material" to defendant's defense had been shown *if* the documents demonstrated that "the British or Irish governments had communications or discussions with American agencies, or officers, which might have resulted in, stimulated, or led to the intensification of the investigation by American agencies" [18] of *The Irish People*.

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[14] Mem. op. at 4, J.A. at 115 (emphasis in original).

[15] 345 U.S. 1 (1953).

[16] *Id.* at 12 (emphasis added by the district court).

[17] Mem. op. at 6, J.A. at 117.

[18] *Id.* at 5, J.A. at 116 (quoting from Second Reply Statement of Points and Authorities in Support of Defendant's Motion to Compel, at 9).

However, it is clear that Congress intended to allow the Attorney General to be motivated in part by foreign policy, international political, and national security considerations, as is discussed at length below.[19] A showing that the Attorney General acted in such a way is not a showing of improper motive at all. Thus, the district court erred if it ruled that defendant was entitled to discovery because the Attorney General may have sought defendant's registration at the request of our allies.[20]

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[19] *See* "2. *The meaning of FARA*," pp. 16-33 *infra*.

[20] *See* mem. op. at 4, J.A. at 115 ("[Deponent] indicated that the United States [State] Department was at one time 'getting various requests from the Government of Ireland as to what the U.S. was doing to prosecute individuals that were shipping guns, ammunition, that was in violation of the Registration Act. . . .' . . . In view of these and other statements . . . it would be unreasonable to deny the requested discovery").

Judge Wald's opinion, while finding that the district court erred in finding a colorable showing of improper motivation since the evidence relied on was too scant, holds open the possibility that a showing of intent by the Attorney General to "alleviat[e] *political* as well as financial and military support furnished by [sic] Irish militants by U.S. citizens," mem. op. at 4, J.A. at 115 (emphasis in original), *would* suffice to show improper motivation.

I disagree, but I should first note the limited scope of our disagreement. We agree that—even under the standard the majority would use—there has been no colorable showing discernible from the district court's opinion here. I am not convinced that the district court *was* using the standard the majority would use—it found "relevant" evidence which in no way demonstrated a desire to alleviate political support—but this disagreement is itself of limited relevance since we are reversing on this issue anyway.

This said, I turn to my disagreement with the majority's position that a desire on the part of the Attorney General to diminish political support for registrants on one side of a political debate is improper. Motive can be improper in two ways: it can have no rational basis under the statutory scheme being enforced, or it can in and of itself be violative of the Constitution. *See* p. 12 *infra*. I think that the discussion

It similarly erred if it held that the documents in question here were relevant to the defense since *they* might

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of *"The meaning of FARA,"* pp. 16-34 *infra*, demonstrates that Congress was more concerned with the registration of agents inimical to American interests than those not, and the whole purpose of the Act is to "alleviat[e] *political* . . . support" for registrants, especially unfriendly ones, by showing for whom they are working. It follows that there would be no *statutorily* improper motive here.

As for *constitutionally* improper motive, I can again only refer to what I say later: that the purpose of the Act is to require registration and disclosure from foreign agents, that this disclosure is required because it will "undermine" the speaker's credibility, and that the courts have consistently held this requirement to be constitutional. *See* pp. 12-14 *infra*.

> [T]he bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment. No strained interpretation should frustrate its essential purpose.

*Viereck* v. *United States*, 318 U.S. 236, 251 (1943) (Black, J., dissenting on other grounds). True, what is involved here is not the constitutionality of the statute on its face, but its constitutionality as allegedly applied. But I think that the same factors that make the statute itself constitutional also make the Attorney General's application of it here constitutional: the Government's interest is great, the infringement on the registrant attenuated and minor. *See* note 25 *infra*. The Act itself may skew domestic "debates over foreign policy," as the majority says at pp. 1-2, *infra*, since foreign agents generally may be more inclined to adopt one set of views than another, so again it will not do to say that it is only the Attorney General's uneven application of the Act that runs afoul of the Constitution. I see no way to conclude that FARA is constitutional and the Attorney General's application of it in the situation hypothesized unconstitutional. So long as the registration and "alleviation of political support" (i.e., disclosure) are sought for considerations consistent with the statute—for foreign policy, international political, and national security reasons—I do not think there is motive violative of the First Amendment. (Note, therefore,

demonstrate that our allies' wishes influenced the Attorney General.[21]

There is some confusion in the case law—and the district court's opinion—over what constitutes "improper motivation." Two kinds of motives are apparently impermissible: those which have no rational basis under the statutory scheme being enforced, and those which are in and of themselves violative of the Constitution.[22]

The analysis of the meaning of FARA in the next section specifically addresses the first objection. It demonstrates that consideration of an ally's wishes and the defendant's alleged foreign ties and unfriendly activities *is* rational under the statutory scheme of the Act.

The centrality of these considerations to FARA also dictates the rejection of any allegation that the registra-

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that a showing that FARA was being used solely, say, to undermine views which might keep the Administration from being reelected *would* suffice.) The majority concedes that the Attorney General may "target those alleged agents deemed most dangerous or powerful (i.e., saboteurs, terrorists)," while denying that this targeting may be done "to manage the information put before the American people in debates over foreign policy." Opinion of Wald, J. at pp. 1-2. But the danger and power of an agent is definable only in political terms, and the whole point of the Act *is* "to manage the information put before the American people in debates on foreign policy."

I fear finally that, because the Attorney General's motives for bringing suit under FARA will invariably involve political considerations, the majority's formulation will make the selective prosecution defense, and the discovery of the sensitive documents also invariably involved, too common. Yet the selective prosecution defense has hitherto been rarely invoked and is even more rarely successful, further evidence that the concurrence's formulation is an incorrect one.

[21] *See* mem. op. at 6, J.A. at 117.

[22] *See, e.g.*, cases cited at note 104 *infra*. *See also Oyler* v. *Boles*, 368 U.S. 448, 456 (1962); *People* v. *Mantel*, 88 Misc. 439, 388 N.Y.S.2d 565, 568 (Crim. Ct. 1976).

tion sought here is improperly motivated as a matter of constitutional law. In the first place, given the conclusion that FARA's origin, language, and application show it to be aimed at agents who are "propagandists" for principals like the IRA, defendant's First Amendment and equal protection constitutional challenges to FARA as applied in this case cannot be separated from a challenge to the general constitutionality of the Act. Yet it is well settled that FARA is constitutional.[23] Moreover, the cases

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[23] The power the Attorney General has under FARA to require registration partly or entirely on the basis of foreign policy, international political, and national security considerations inevitably raises equal protection and First Amendment issues. However, it seems pointless to deal at length with these issues here since FARA's constitutionality is well-settled. It has been on the books for over 40 years, and cases involving it have been before the federal courts at every level—including the Supreme Court—without there ever being a holding of unconstitutionality. On several occasions, constitutional challenges at best indistinguishable—and probably much stronger—than those defendant could raise here have been explicitly rebuffed. *See Attorney Gen.* v. *INAC*, No. 77 Civ. 708-CSH, mem. op. and order at 16-17 (S.D.N.Y. 30 Apr. 1981), *aff'd*, No. 81-6141 (2d Cir. 5 Jan. 1982) (citing *Viereck* v. *United States*, 318 U.S. 236, 251 (1943) (Black, J., dissenting)); *Attorney Gen.* v. *INAC*, 346 F. Supp. 1384, 1390-91 (S.D.N.Y.), *aff'd mem.*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1080 (1972) (citing *Uphaus* v. *Wyman*, 360 U.S. 72 (1959); *Barenblatt* v. *United States*, 360 U.S. 109 (1959); *Wilkinson* v. *United States*, 365 U.S. 399 (1961); *Communist Party of the U.S.* v. *Subversive Activities Control Bd.*, 367 U.S. 1 (1960); *Albertson* v. *Subversive Activities Control Bd.*, 382 U.S. 70 (1965)); *United States* v. *Peace Information Center*, 97 F. Supp. 255, 260 (D.D.C. 1951) ("The power over external relations of the United States is extensive. It authorizes the Federal Government to deal with all phases of this subject. It comprizes [sic] not only authority to regulate relations with foreign countries, but also to prohibit any disturbance or interference with external affairs"). *See also Viereck* v. *United States*, 318 U.S. 236, 251 (1943):

> As the House and Senate Committees considering the [FARA] Bill said, it "does not in any way impair the

upholding its constitutionality generally involved agents with specific constitutional claims at least as colorable as defendant's here.[24] Finally, there is certainly no reason to disturb these precedents on the basis of the facts before us today. All that is sought here is registration and disclosure. No limit is to be placed on what defendant can say, or whom he can see.[25]

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right of freedom of speech, or free press, or other constitutional rights." Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment. No strained interpretation should frustrate its essential purpose.

(Black, J., dissenting); *Narenji* v. *Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980) (discussed at note 25 *infra*); *United States* v *Elliott*, 266 F. Supp. 318 (S.D.N.Y. 1967).

[24] *See* preceding note.

[25] Thus, to the extent the balance struck here between *The Irish People's* claims and governmental necessity must be scrutinized, the Attorney General has acted permissibly. As was noted in the related proceedings in the Second Circuit:

> No such showing ["that disclosure would expose . . . members to economic reprisal, loss of employment, physical coercion, etc., *and* that the disclosure would have little or no bearing on the information the state was attempting to obtain"] appears here. Unlike *NAACP* [v. *Alabama*, 357 U.S. 449 (1958)], there is a strong governmental interest supporting the disclosure sought and, in such cases, the [Supreme] Court has required production. *See Uphaus* v. *Wyman*, 360 U.S. 72 . . . (1959); *Barenblatt* v. *United States*, 360 U.S. 190 . . . (1959). This is a case in which a balance between individual and governmental interests must be struck as in all cases when First Amendment rights are asserted to bar governmental in-

Because the Attorney General's mandate under FARA is critical to the decision today, the statutory language,

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terrogations. *Barenblatt, supra.* Here the balance tilts strongly in favor of the Government.

> The purpose of the Act is to protect the interests of the United States by requiring complete public disclosure by persons acting for or in the interests of foreign principals where their activities are political in nature. . . .
>
> The Act is founded upon the indisputable power of the Government to conduct its foreign relations and to provide for the national defense and so falls within the inherent regulatory power of Congress. . . .
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> . . . .
>
> And so, here disclosure of defendant's activities bears a substantial relation to a legitimate interest which is asserted by the Government to justify the disclosure. The governmental interest may fairly be said to outweigh any possible infringement of the First Amendment rights of the defendant's members or contributors.

*Attorney Gen.* v. *INAC*, 346 F. Supp. 1384, 1390-91 (S.D. N.Y.), *aff'd mem.*, 464 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1080 (1972) (footnotes omitted) (emphasis added). *See also FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *Buckley* v. *Valeo*, 424 U.S. 1, 66-68, 71-72, 80-81 (1976) (upholding disclosure requirements of the Federal Election Campaign Act of 1971 since they "directly serve substantial governmental interests" outweighing any "burden that they place on individual rights," *id.* at 68); *Zerilli* v. *Smith*, 656 F.2d 705 (D.C. Cir. 1981) (also supporting a "balancing" approach in a similar context) (discussed at p. 49 *infra*). A greater deference should be given the political branches in the foreign relations context. *See, e.g., Narenji* v. *Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980) (requiring, in the context of classifications among aliens, only a "rational basis" for such classifications since foreign policy considerations may be involved) (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976) ("Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution") and *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("Such matters [which are "vitally and intricately

legislative history, and case law of the Act must be reviewed in some detail.

2. *The meaning of FARA*

Reviewing the language and history of FARA, and the case law under it, makes clear that the Attorney General may, consistent with the Act's scheme and Congress' intent, keep foreign policy, international political, and national security considerations in mind in his enforcement of the statute.

a. *Language of the statute*

Before discussing the actual language of the statute, it merits mentioning that the Act is found in Title 22 of the U.S. Code, "Foreign Relations and Intercourse," at Chapter 11, "Foreign Agents and Propaganda." This is an immediate indication that we are dealing here with a statute whose underlying nature is rooted in international political considerations and the conduct of foreign policy. This also reflects, as should be kept in mind throughout our review of the statute and its history, that a deliberate major concern of Congress was to require the disclosure of the foreign principal behind *propaganda* activities.

These considerations are reflected most strongly in the Act's provisions themselves. In § 611, the definitional section, one criterion of an "agent of a foreign principal" is that he "engage[] within the United States in *political activities* for or in the interests of such foreign principal." [26] "Public-relations counsel" are limited to persons representing a principal in matters "pertaining

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interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government"] are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference")).

*See also* note 20 *supra*.

[26] 22 U.S.C. § 611(c) (1976) (emphasis added).

to *political or public interests, policies, or relations of such principal.*" [27] Section 611(e) "government of a foreign country," § 611(f) "foreign political party," § 611(j) "political propaganda," § 611(o) "political activities," and § 611(p) "political consultant" are all naturally defined in political terms also. The limitation of the Act to political behavior indicates its preeminent concern with international political and domestic security matters.

That the Act was geared toward use in the foreign policy and national security areas is also reflected by the limitation of the term "political propaganda" to matters involving the political interests of foreign governments and parties, United States "foreign policies," United States "dissensions," or "any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic," [28] where "American republic" is limited to those "states which were signatory to the Final Act of the Second Meeting of the Ministers of Foreign Affairs of the American Republics at Habana, [sic] Cuba, July 30, 1940." [29] It should also be obvious—and reviewing of the legislative history amply confirms this—that to the extent FARA focuses on subversion by foreign powers, foreign policy concerns become inevitable. The Attorney General may channel his limited resources against agents of those powers inimical to the United States, who are more likely to subvert our allies and interests.

Section 612(f) gives the criteria for exemption from the general filing requirements of § 612(a)[30]: "The At-

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[27] *Id.* § 611(g) (emphasis added).

[28] *Id.* § 611(j).

[29] *Id.* § 611(*l*).

[30] Section 612(a) states: "No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement and supplements thereto as required . . . or unless he is exempt from registration under the provisions of this subchapter."

torney General may, by regulation, provide for the exemption— . . . where by reason of the nature of the functions or activities of such person the Attorney General, *having due regard for the national security and the public interest*, determines that such registration, or the furnishing of such information, as the case may be, is not necessary to carry out the purposes of this subchapter." [31]

Broader exemptions are set out in § 613,[32] which declares that the requirements of § 612(a) "shall not apply to the following agents of foreign principals," and then lists seven categories of persons exempted. These categories are: "Diplomatic or consular officers"; "Official of foreign government"; "Staff members of diplomatic or consular officers"; "Private and nonpolitical activities; solicitation of funds"; "Religious, scholastic, or scientific pursuits"; "Defense of foreign government vital to United States defense"; and "Person qualified to practice law." With the exception of the last category, it is clear that all the exemptions are rooted in either foreign policy concerns or can be explained by the fact that Congress was interested in monitoring public and political activities, rather than private, nonpolitical, religious, scholastic, scientific, or similar activities which have only an attenuated relationship to foreign policy and national security.[33]

Section 614 is devoted to the "Filing and labelling of political propaganda," and § 621 requires that "[t]he Attorney General shall, from time to time, make a report to the Congress concerning the administration of this subchapter [i.e., FARA], including the nature, sources, and

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[31] *Id.* § 612(f).

[32] *Id.* § 613.

[33] The lack of interest which Congress had in "nonpolitical" and "private" matters is restated in the legislative history of this section. *See* S. REP. No. 1061, 87th Cong., 1st Sess. 1 (1961). The Attorney General specifically endorsed this legislation. *Id.* at 3-4.

content of *political propaganda* disseminated or distributed." [34]

Finally, and perhaps most significant of all, § 616 requires the Attorney General

> promptly upon receipt [to] transmit one copy of every registration statement filed hereunder and one copy of every amendment or supplement thereto, and one copy of every item of political propaganda filed hereunder, *to the Secretary of State for such comment and use as the Secretary of State may determine to be appropriate from the point of view of the foreign relations of the United States.*[35]

Section 616 also authorizes the Attorney General

> *to furnish to departments and agencies in the executive branch and committees of the Congress such information obtained by him* in the administration of this subchapter, including the names of registrants under this subchapter, copies of registration statements, or parts thereof, copies of political propaganda, or other documents or information filed under this subchapter, *as may be appropriate in the light of the purposes of this subchapter.*[36]

b. *Legislative history*

That FARA was to serve a foreign policy-oriented role was apparent from the outset. It is worth noting that the registration functions originally belonged to the Secretary of State and were transferred to the Attorney General only in 1942.[37] The House Report[38] accompanying the original bill was entitled "Investigation of Nazi and

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[34] 22 U.S.C. § 621 (1976) (emphasis added).

[35] *Id.* § 616(b) (emphasis added).

[36] *Id.* § 616(c) (emphasis added).

[37] *See* Exec. Order No. 9176, 7 Fed. Reg. 4127 (1942).

[38] H.R. REP. No. 153, 74th Cong., 1st Sess. (1935).

Other Propaganda." The bill set out the results of the investigation of Naziism, Fascism, and Communism and other foreign-controlled political movements. The Report evinced a particular concern with violence and of course with foreign control.[39] Concern was also expressed with the fact that the movements sought to influence "our governmental policies."[40] The Report concluded:

> . . . .
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> 2. That Congress should enact a statute conferring upon the Secretary of Labor authority to shorten or terminate the stay in this country of any visitor admitted here under temporary visa, whenever in the judgment of the Secretary such visitor shall engage in the promotion or dissemination of propaganda or engage in political activity in the United States.
>
> 3. We recommend that the Department of State, in collaboration with the Department of Labor, negotiate treaties and agreements with foreign nations by which such nations shall agree to receive back any persons entering this country from such foreign nation at any time such immigrant shall become subject to deportation under our laws.
>
> . . . .
>
> 6. That Congress should make it an unlawful act for any person to advocate changes in a manner that incites to the overthrow or destruction by force and violence of the Government of the United States, or of the form of government guaranteed to the several States by article IV, section 4, of the Constitution of the United States.[41]

The focus on radical violence and foreign affairs was to be a recurrent theme in the legislative history of not only the initial passage of FARA but also of its subse-

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[39] *Id.* at 13, 20, 23, 24.

[40] *Id.* at 7.

[41] *Id.* at 23-24.

quent amendments. These themes significantly illuminate today's case.

The House Report of the 75th Congress[42] in 1937 declared that the basic purpose of the Act was to focus a "spotlight of pitiless publicity" on those organizations financed by "foreign governments or foreign political groups" to spread propaganda and thereby "influence the external and internal policies of this country."[43] This Report emphasized that the purpose of the Act was disclosure rather than prohibition. Moreover, the Report continued, "the provisions of this measure [will] have no reference to nor include any person performing only private, non-political, financial, mercantile, commercial, or other activity in furtherance of bona-fide trade or commerce of a foreign principal."[44] The Senate Report[45] of the same Congress incorporated the House Report.[46]

The 77th Congress amended the 1938 version of the Act. The Senate Report outlining the changes made in the Act was dated nine days after the attack on Pearl Harbor.[47] It stated that the Act was "prefaced by a section stating the policy and purpose of the statute and emphasizing its function as a means of enabling the people of the United States to appraise the propaganda and other activities of foreign agents in the light of their association and background."[48] The section read:

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[42] H.R. REP. No. 1381, 75th Cong., 1st Sess. (1937).

[43] *Id.* at 1-2.

[44] *Id.* at 2.

[45] S. REP. No. 1783, 75th Cong., 3d Sess. (1938).

[46] *Id.* at 1-2.

[47] S. REP. No. 913, 77th Cong., 1st Sess. (1941).

[48] *Id.* at 9.

POLICY AND PURPOSE

> *It is hereby declared to be the policy and purpose of the Act to protect the national defense, internal security, and foreign relations of the United States* by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.[49]

The Report also incorporated a letter from Attorney General Biddle endorsing the Act and emphasizing the "non-political nature" of the exemptions allowed.[50] Again, the international political and foreign policy considerations were obvious in both the amendments to the Act and their genesis.

The House Report[51] of that session spoke of the "transfer [of administration] of the Act from the Department of State to the Department of Justice."[52] In this vein, the Report continued: "*The [amended] section also provides coordination with the State Department by providing that it shall receive a copy of each registration statement for examination from the point of view of the foreign relations of the United States.*"[53]

One interesting highlight of the amendments proposed in 1941 and 1942 further illuminates the foreign policy and international political considerations inherent in the

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[49] *Id.* at 1 (emphasis added). This statement of purpose has been incorporated by the Department of Justice in its own pamphlet on FARA. *See* p. 33 *infra.*

[50] *Id.* at 11.

[51] H.R. REP. No. 1547, 77th Cong., 1st Sess. (1941).

[52] *Id.* at 2.

[53] *Id.* at 4 (emphasis added).

Act. Certain sections of the bill were rejected [54] by President Roosevelt as putting too great a strain on our relations with wartime allies whose agents might have to register under the terms of the original amendments.[55] Subsequently, therefore, an exemption was added to the Act for agents "whose foreign principal is a government of a foreign country the defense of which the President deems vital to the defense of the United States . . . ." [56] The amendment was made pursuant to a suggestion by Attorney General Biddle, the letter accompanying which is incorporated in both the subsequent House Report and

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[54] *See* Letter from President Roosevelt to the House of Representatives, 9 February 1942, *reprinted in* 88 CONG. REC. 1139 (1942).

The final version of the bill passed by the Senate and Congress in 1941 was, except for these sections, identical to the one rejected by President Roosevelt earlier that year. The House and Senate Reports at that time incorporated the earlier House and Senate Reports by reference. H.R. REP. NO. 2038, 77th Cong., 2d Sess. 3 (1942); S. REP. NO. 1227, 77th Cong., 2d Sess. 3 (1942).

[55] Ironically, the original version passed by Congress was more deferential to the Soviet Union than some legislators had wanted. One proposed amendment to the original bill would have expressly mentioned "the Communist Party of the United States, the German-American Bund, and Kyffhauserbund" as "persons" within the meaning of the Act. After an extensive debate on the floor of the House this amendment was rejected. The rationale behind the rejection of this amendment, like the rationale of the entire bill, was expressly rooted in foreign policy and political considerations. Specifically, those speaking against the amendment cited the necessity of not offending the Russians at a time when we were fighting a common enemy; those supporting the amendment cited the need to recognize that, although we were fighting Nazi Germany together, the interests of the United States and Stalinist Russia remained diametrically opposed. *See* 88 CONG. REC. 797-806 (1942).

[56] Ch. 263, § 3(f), 56 Stat. 254 (1942).

Senate Report,[57] and this provision remains in the current version of the law.[58] When a foreign principal is deemed to be a government essential to the defense of the United States,

> such government of a foreign country [must] furnish[] to the Secretary of State for transmittal to, and retention for the duration of [the Act] by, the Attorney General such information as to the identity and activities of such person or employee at such times as the Attorney General may require. Upon notice to the Government of which such person is an agent or to such person or employee, *the Attorney General, having due regard for the public interest and national defense, may, with the approval of the Secretary of State, and shall, at the request of the Secretary of State, terminate in whole or in part the exemption* herein of any such person or employee . . . .[59]

Thus, Congress amended the Act specifically to prevent its hampering of relations with friendly countries. If agents of foreign principals essential to our defense may be exempted from FARA altogether for the sake of our foreign policy, then it is certainly within the intent of the Act that in his enforcement the Attorney General may consider the identity of an unfriendly principal and the wishes of our allies.

In 1950 the definitional section of FARA was amended to include "a new category of persons within the definition of the term 'agent of a foreign principal.' The new category consist[ed] of persons who have knowledge of or have received instruction or assignment in the espionage, counter espionage, or sabotage service of a foreign gov-

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[57] H.R. REP. No. 2038, 77th Cong., 2d Sess. 2-3 (1942); S. REP. No. 1227, 77th Cong., 2d Sess. 2-3 (1942).

[58] 22 U.S.C. § 613(f) (1976).

[59] *Id.*

ernment or political party . . . ." [60] This part of FARA is now incorporated in sections 851 and 852 of Title 50, "War and National Defense." The 1950 amendments were part of the Internal Security Act of 1950, the primary purpose of which was "to combat un-American activities by requiring the registration of Communist organizations . . . ." [61] Thus Congress modelled FARA precisely so that it could be used against those organizations inimical to American interests.

Further amendments were added to FARA in 1966. Again, Congress' concern with political, and not apolitical, activity underscored the international political and domestic security focus of the Act.[62] The Report also stated: *"The Secretary of State will be provided copies of the registration statements and political propaganda filed with the Department of Justice under the requirements of the [A]ct,"* "[c]ontingent fee contracts between agents and foreign principals based upon success in political activities to be undertaken by the agent are banned," and "[c]ampaign contributions for or in behalf of a foreign principal are prohibited in connection with any election to public office or in connection with any primary election or convention to select candidates for office." [63]

That Congress intended and desired that the legislation be sensitive to the requirements of national security was reflected by its statement that some changes in the statutory language had to be made since many of the earlier provisions had been dictated by the "prewar circumstances surrounding enactment of the law." [64] The sec-

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[60] H.R. REP. No. 3112, 81st Cong., 2d Sess. 53 (1950).

[61] H.R. REP. No. 2980, 81st Cong., 2d Sess. 1 (1950).

[62] *See, e.g.*, H.R. REP. No. 1470, 89th Cong., 2d Sess. 2-3 (1966).

[63] *Id.* at 3 (emphasis added).

[64] H.R. REP. No. 1470, 89th Cong., 2d Sess. 4 (1966).

tion-by-section analysis [65] of the proposed amendments stated that they

> would take into account the change of circumstances of the present day by requiring a showing not only of foreign connections but also of certain activities performed by the agent for foreign interests which are either political in nature or which are carried on in particularly sensitive areas in which the line between political and non-political action is difficult to define.[66]

The House Report also stated that the phrase "political or public interests, policies, or relations," referred to "matters which on the domestic governmental level would be called a policy matter, in the international context may be called questions concerning a country's foreign relations, and in the context of party politics may be termed matters involving the national interest." [67]

The House Report emphasized that one of the new subsections

> would require the Attorney General to transmit to the Secretary of State not only the initial registration statement, as under existing law, but, in addition, supplemental and amendatory statements in propaganda filed with him by agents. *The Secretary of State would be authorized to comment on the statements and to make such use of them and the related material as seems appropriate from the standpoint of the Nation's foreign relations. This, for example, would enable the Secretary of State to make Ameri-*

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[65] The House Report adopted, with only minor changes, the section-by-section analysis of S. REP. No. 143, 89th Cong., 1st Sess. 6-16 (1965).

[66] H.R. REP. No. 1470, 89th Cong., 2d Sess. 4 (1966). The bill was apparently prompted also by the behavior of "foreign sugar lobbyists" and "others whose conduct was criticized as a result of the Senate hearings."

[67] *Id.* at 7 (1966). The passage was taken from S. REP. No. 143, 89th Cong., 1st Sess. 9 (1965).

> *can embassies and other missions more fully informed of the activities of agents of foreign principals.*[68]

The Report pointed out that a new subsection would authorize the Attorney General to circulate copies of acquired material

> to other branches, agencies and officials of the Government, as appropriate. It would, for example, be appropriate in light of the purposes of the act for such statements of propaganda to be forwarded to specific agencies named in the statements as the object of the agent's political activities or to congressional committees concerned with legislation which, according to the material filed by the agent, is the subject of his interest.[69]

It should be mentioned that departmental reports on the 1966 amendments were received from agencies involved with American foreign relations, while an agency concerned with foreign relations only to the extent that they have impact on non-political activities made the determination that comment would be inappropriate.[70]

The Senate Report[71] for the 1966 amendments made some important additional points. In its discussion of the bill's main purpose, it stated that the amendments were "intended to protect the interests of the United States" by requiring disclosure by agents "acting for or in the interests of foreign principals where their activities are political in nature or border on the political." These disclosures would "permit the Government and the people of

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[68] H.R. REP. No. 1470, 89th Cong., 2d Sess. 14 (1966). The passage was taken from S. REP. No. 143, 89th Cong., 1st Sess. 13 (1965). The section referred to is now at 22 U.S.C. § 616 (1976).

[69] H.R. REP. No. 1470, 89th Cong., 2d Sess. 14 (1966).

[70] *Id.* at 15-21.

[71] S. REP. No. 143, 89th Cong., 1st Sess. (1965).

the United States to be informed as to the identities and activities of such persons and so be better able to appraise them and the purpose for which they act." [72]

The amendments were also "aimed at better focusing the act on those individuals attempting to influence Government policies through political activities." [73] In particular, the amendments were tailored to provide better disclosure when agents were "contacting Members or committees of the Congress or Government officials on policy matters in behalf of their foreign principal . . . ." [74] The Report noted the "persistent efforts by numerous agents of foreign principals to influence the conduct of U.S. foreign and domestic policies *using techniques outside the normal diplomatic channels.*" [75] The Report found it "noteworthy that the increased tempo of non-diplomatic activity has picked up in almost direct proportion to our Government's growing political, military, and economic commitments around the world." [76]

Given the established linkage between the defendant, INAC, and the IRA,[77] clearly the statutory objectives are consonant with the registration of the defendant.

c. *Case law*

Soon after FARA was originally enacted the Supreme Court had occasion to elucidate the purpose of the Act in *Viereck* v. *United States.*[78]

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[72] *Id.* at 1.

[73] *Id.*

[74] *Id.* at 2.

[75] *Id.*

[76] *Id.*

[77] Judge Haight so found in *Attorney Gen.* v. *INAC*, No. 77 Civ 708-CSH, mem. op. at 29-33, 39-42 (S.D.N.Y. 30 Apr. 1981), and was affirmed by the Second Circuit on 5 January 1982 (Docket No. 81-6141).

[78] 318 U.S. 236 (1943).

> The Act of 1938 requiring registration of agents for foreign principals was a new type of legislation adopted in the critical period before the outbreak of the war. The general purpose of the legislation was to identify agents of foreign principals *who might engage in subversive acts or in spreading foreign propaganda*, and to require them to make public record of the nature of their employment. . . . These means [used to accomplish the ends of the statute] included the requirement of registration of agents for foreign principals . . . and the requirement that the registrant give certain information concerning his activities as such agent.[79]

Only Justices Black and Douglas dissented from the Supreme Court's opinion in *Viereck*, and they did so on grounds unrelated to the majority's statement of the general purpose of the statute. They also stated the purpose of FARA:

> The general intent of the Act was to prevent secrecy as to any kind of political propaganda activity by foreign agents. Both the House and Senate Committees reporting the Bill under consideration declared it to be their purpose to turn "the spotlight of pitiless publicity" upon the propaganda activities of those who were hired by foreign principals. Appreciating that "propaganda efforts of such a nature are usually conducted in secrecy," they wanted to make full information concerning it "available to the American public" and sought by "the passage of this bill" to "force propaganda agents representing foreign agencies to come out 'in the open' in their activities, or to subject themselves to the penalties provided in said bill."[1] They declared that the purpose of the Bill was to require all such hired agents "to register with the State Department and to supply information about their *political activities*, their employers, and the terms of their contracts."[2]
>
> What emerged from extended Congressional investigations, hearings and deliberations was this Act,

[79] *Id.* at 241 (emphasis added).

intended to provide an appropriate method to obtain information essential for the proper evaluation of political propaganda emanating from hired agents of foreign countries. As the House and Senate Committees considering the Bill said, it "does not in any way impair the right of freedom of speech, or of a free press, or other constitutional rights." Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment. No strained interpretation should frustrate its essential purpose.

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[1] Senate Report No. 1783, House Report No. 1381, 75th Cong., 3d Sess.

[2] The House Committee hearings, which are available in manuscript form only, show the same broad purpose. In explaining the Bill to the House Committee, its author pointed out that *it was particularly aimed at firms, groups, or businesses, used "as a means for that particular country or political party to hide its identity"* and that the Bill covered "all activities of all kinds, that is, all propaganda activities, no matter from what source it emanates." The Congressional Committee, whose Chairman was the author of this Bill, had discovered through hearings, that business enterprises had been utilized as a means for propagandizing, and that many persons including the petitioner here had published articles in various magazines, concealing their identity behind pseudonyms. The purpose of these activities, the Committee found, had been to influence "the policies, external and internal, of this country, through group action. They were employing the same method that they had employed in Germany for the purpose of obtaining control of the government over there." [80]

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[80] *Id.* at 250-51 (emphasis added in note 2).

*United States* v. *Peace Information Center*[81] quoted extensively from the original House Report in finding that "[t]he intent and purpose of the Congress in enacting [FARA]" was to "'publicize'" those "'propagandists'" who seek to "'influenc[e] American political opinion on a political question.'"[82] It quoted *Viereck* in finding that the "'general purpose'" of this "'new type of legislation adopted in the critical period before the outbreak of the war'" was to "'identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment.'"[83] The main focus of *Peace Information Center* was on the constitutionality *vel non* of the Act, and its finding that FARA was constitutional was based largely on Congress' broad authority to legislate on matters concerning foreign relations and national defense.

That the Attorney General may properly factor in national security, international political, and foreign policy considerations was reflected also in an opinion by Judge Bauman in 1972,[84] in which he ordered the alleged principal in our case, INAC, to produce its books and records for officials charged with the enforcement of FARA:

> The purpose of the Act is to protect the interests of the United States by requiring complete public disclosure by persons acting for or in the interests of foreign principals where their activities are political in nature. These disclosures offer the Goverment and our people the opportunity to be informed and there-

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[81] 97 F. Supp. 255 (D.D.C. 1951).

[82] *Id.* at 258-59 (quoting H. R. REP. No. 1381, 75th Cong., 1st Sess. 2 (1937)).

[83] *Id.* at 259 (quoting *Viereck*, 318 U.S. at 241).

[84] *Attorney Gen.* v. *INAC*, 346 F. Supp. 1384 (S.D.N.Y.), *aff'd mem.*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1080 (1972).

> fore enable them to understand the purposes for which they act.
>
> The Act is founded upon the indisputable power of the Government to conduct its foreign relations and to provide for the national defense . . . .
>
> . . . Its purpose is to meet the Government's need for records necessary to enforce its national defense and foreign policies.[85]

He went on to point out that INAC

> engages in activities designed to promote the cause of one faction in the current dispute in Northern Ireland. Its fund raising and propaganda activities may well be designed to influence American policy or, put most charitably, may result in serious complications for the Government in its conduct of foreign affairs.[86]

Most recently Judge Haight began his opinion—wherein he found INAC to be an agent of the Irish Republican Army and ordered it to comply with FARA—with the recognition that "[t]he general purpose of the Act is to protect the security and foreign relations of this country by requiring agents of foreign principals to identify themselves and disclose their activities." [87]

Finally, the pattern of criminal prosecutions under FARA has, from the beginning, reflected the foreign policy and national security concerns of our Government, and Congress has never indicated any disapproval. The first three prosecutions brought, from 1939-40, involved the Soviet Union. Then, from 1940

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[85] *Id.* at 1390 (footnote omitted).

[86] *Id.* at 1391. This passage was quoted approvingly, albeit in a different context, by Judge Haight in his opinion. *Attorney Gen.* v. *INAC*, No. 77 Civ. 708-CSH, mem. op. at 29 (S.D.N.Y. 30 Apr. 1981), *aff'd*, No. 81-6141 (2d Cir. 5 Jan. 1982).

[87] *Attorney Gen.* v. *INAC*, No. 77 Civ. 708-CSH, mem op. at 2 (citing *Viereck* v. *United States*, 318 U.S. at 251 (Black, J., dissenting)).

through the end of World War II, of the sixteen prosecutions brought eleven involved Germany. The remaining five were divided, significantly, among Japan, Italy, Finland, Rumania, and Spain. In 1963 the Department of Justice reported that since World War II there have been twelve additional prosecutions. The principals alleged were, again, as we would expect: three prosecutions involved the Soviet Union, five Cuba, one Rumania, two the Dominican Republic, and one the Committee of World Congress of the Defenders of Peace.[88] In the Justice Department's own pamphlet *The Foreign Agents Registration Act of 1938 as Amended*, it is stated that the policy and purpose of the Act is

> to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in light of their associations and activities.[89]

3. *Conclusion*

A review of the language, history, and case law of the Foreign Agents Registration Act demonstrates that it was inspired by national security, international political, and foreign policy considerations. The design and

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[88] *Hearings Before the Senate Comm. on Foreign Relations: Activities of Non-Diplomatic Representatives of Foreign Principals in the United States*, 88th Cong., 1st Sess. 70-73 (Part I) (1963), *reprinted in* J.A. at 145-48.

[89] U.S. DEP'T OF JUSTICE, THE FOREIGN AGENTS REGISTRATION ACT OF 1938 AS AMENDED AND THE RULES AND REGULATIONS PRESCRIBED BY THE ATTORNEY GENERAL 7 (undated). This repeats the statement of "POLICY AND PURPOSE" given in S. REP No. 913, 77th Cong., 1st Sess. 1 (1941). *See* p. 22 *supra*.

use of FARA has reflected the evolving concerns of American foreign policymakers. It was prompted by and first used extensively against Fascism and Naziism in the 1930s and then during World War II itself, was then aimed more toward the Soviet Union and its allies in the post-war period, and—apparently—today is being employed for disclosing links with international terrorists.[90] The Attorney General has only limited time and money to spend on enforcement, and may, consistent with the Constitution and the statute, channel his efforts in a way consistent with the underlying purpose of the Act. There is nothing in the district court's opinion to demonstrate that he acted in a way inconsistent with FARA's rationale—to the contrary. The Attorney General was entitled in the case before us to take into account the wishes of our allies and the uncongeniality of the prospective registrant's ultimate principal.[91] Unless the district court finds that the documents at issue demonstrate colorably he did more than this, there has been no colorable showing of improper motivation.

B. *Lack of Selection*

Even before the district court reached the question of *improper motive*, it should have considered whether there had been any *selection*. Defendant must make a colorable showing that he has been especially singled out, that there exist persons similarly situated who have not been prosecuted. Without such a showing, it is irrelevant that

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[90] Besides the case involving the IRA before us, the other conspicuous recent use of FARA was to require Billy Carter's registration as an agent of Libya in 1980.

[91] Note also that apparently "the U.S. government has a long standing policy against granting visas to IRA members." Hosenball, *Irish Burlesque*, THE NEW REPUBLIC, 3 March 1982, at 10. While this policy is constitutionally distinguishable, it would be at least anomalous to hold that visas could be denied for motives which are improper in requiring registration.

the British or Irish may also have wanted the suit brought.

This court recently had occasion to consider the selective prosecution defense in *United States* v. *Diggs*.[92] It is clear from *Diggs* that a demonstration of selection is indispensable for the defense and that the burden of so demonstrating lies squarely on the defendant. *Diggs* established a two-step process, under which the determination of selection should come first. And whether a judge determines the discrimination or selection first or last, at some point he *must* make this determination. *In the case at hand, however, not only was there no showing that the selection was improperly motivated, there was no showing that there had been any selection at all.*

The two elements of discriminatory selection and improper motive might be compared to the two elements of conspiracy, i.e., an agreement making up the conspiracy plus an overt act carrying the conspiracy into effect. Chronologically, in the case of discriminatory prosecution, the two steps are reversed in time, but we must have both. The improper motive compares to the agreement for an illegal object; the actual discriminatory selection compares to the overt act. Both elements are necessary for a conspiracy charge and both elements must be clearly and separately shown for a selective prosecution defense.

As stated in *United States* v. *Scott*:

> In order to prevail in this allegation [of selective prosecution] appellant must bear the burden of proving at least a prima facie case. This requires that appellant first demonstrate that others similarly situated generally have not been prosecuted for conduct similar to that for which he was prosecuted.[93]

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[92] 613 F.2d 988 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980).

[93] 521 F.2d 1188, 1195 (9th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976) (involving alleged failure to file income tax forms).

The district court stated that "[t]he present case does not lend itself easily to such analysis [as in *Scott*], however, because of the manifest difficulty of finding others 'similarly situated' in the sense of voicing strong and regular opposition to the foreign policy (regarding Ireland) of a major United States ally (Great Britain)."[94] Concluding that the *Scott* test is inappropriate, however, assumes the conclusion. If there are few "similarly situated" to *The Irish People*, it is precisely because of its uniqueness that we would find it difficult to fault the Attorney General's decision to require it to register. If, as the district court found, there was no one to whom defendant could be compared in order to resolve the question of selection, then it follows that defendant has failed to make out one of the elements of its case. Discrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances.[95] Where defendant cannot show anyone in a similar situation who was not prosecuted, it has been held that he has not "met even the threshold point of the *Yick Wo* doctrine—'official discrimination . . . between persons in similar circumstances, material to their rights . . . .'"[96] Thus, if we accept the district court's conclusion that few are "similarly situated" with defendant—a tenuous assertion, in light of our discussion below[97] of past registrations—we would not find for defendant.

This was, indeed, precisely the conclusion reached by Judge Haight in *Attorney General* v. *INAC*,[98] a "com-

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[94] Mem. op. at 3, J.A. at 114.

[95] *See Yick Wo* v. *Hopkins*, 118 U.C. 356 (1886); *United States* v. *Elliott*, 266 F. Supp. 318 (S.D.N.Y. 1967).

[96] *United States* v. *Elliott*, 266 F. Supp. 318, 324 (S.D. N.Y. 1967).

[97] P. 36 *infra*.

[98] No. 77 Civ. 708-CSH (S.D.N.Y. 30 Apr. 1981), *aff'd*, No. 81-6141 (2d Cir. 5 Jan. 1982).

prehensive opinion"[99] recently affirmed by the Second Circuit. There the court ordered INAC—the alleged principal in our case[100]—to register under FARA as an agent of the IRA. Judge Haight used the same two-pronged test we do today, relying on the Second Circuit case of *United States* v. *Berrios*.[101] He found, as we do, that neither part of the test had been met.[102] Specifically with regard to the lack of selection, he stated, "Even assuming that [INAC] has satisfied [the "improper motive"] prong of the *Berrios* test, *it has pointed to no instances in which others allegedly in violation of the Act have not been prosecuted. The absence of such proof, by itself, defeats the defense.*"[103]

Moreover, in choosing to rely on what it believed to be an alternative test found in some other cases,[104] the district court in our case incorrectly concluded that these alternative tests obviated the need for the threshold examination of selection. To the contrary, a careful reading of these cases shows no deviation from the established two-step test of establishing selection and then the motive for selection. The passages cited by the district court

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[99] *Attorney Gen.* v. *INAC*, No. 81-6141, slip op. at 683 (2d Cir. 5 Jan. 1982).

[100] The alleged three-link IRA-INAC-*The Irish People* relationship is discussed at note 2 *supra*.

[101] 501 F.2d 1207 (2d Cir. 1974).

[102] Mem. op. at 17-20.

[103] *Id.* at 20 (citing *Berrios*, 501 F.2d at 1211-12) (emphasis added).

[104] They were cited and discussed at pp. 3-4 of the memorandum opinion, J.A. at 114-15. They are: *United States* v. *Peskin*, 527 F.2d 71, 85-86 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976); *United States* v. *Oaks*, 508 F.2d 1403, 1404 (9th Cir. 1974); *United States* v. *Berrios*, 501 F.2d 1207, 1211-12 (2d Cir. 1974); *United States* v. *Berrigan*, 482 F.2d 171, 177 (3d Cir. 1973); *United States* v. *Falk*, 479 F.2d 616, 620-21 (7th Cir. 1973) (en banc).

from these cases deal not with the essential elements of the defense but with the degree to which these elements must be established before defendant can prevail. Indeed, in each case the need for the establishment of the fact of selection is recognized.[105] At any rate, we reaffirm that *Diggs* is the controlling case for this Circuit.

Concluding that defendant failed to make out the first part of the two-element test for selective prosecution, and that both elements are required for the defense, does not quite end the inquiry, however. There remains the issue of whether this being so, there is no necessity of showing both where all that is being sought is *discovery*. Thus, the district court's opinion may be read as requiring less than the two-part test for deciding whether discovery is appropriate, even if the two-part test is still necessary for the selective prosecution claim itself.

Again following *Diggs*,[106] we can see no reason for throwing out half the standard on the discovery issue. If either part of the test is failed, the defense fails; thus it makes sense to require a colorable claim of both before subjecting the Government to discovery. Since it is well established that, even in the context of a criminal prosecution, the Government enjoys a presumption of having "undertaken [the action] in good faith and in nondiscrimi-

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[105] *See Peskin*, 527 F.2d at 85-86; *Oaks*, 508 F.2d at 1404, and later proceeding at 527 F.2d 937, 940 (9th Cir. 1975), *cert. denied*, 426 U.S. 952 (1976); *Berrios*, 501 F.2d at 1211; *Berrigan*, 482 F.2d at 173, 179; *Falk*, 479 F.2d at 619-23. Indeed, it was *Berrios* on which Judge Haight relied in his own application of the two-pronged selective prosecution test in *Attorney Gen.* v. *INAC*, No. 77 Civ. 708-CSH, mem. op. at 19-20 (S.D.N.Y. 30 Apr. 1981), *aff'd*, No. 81-6141 (2d Cir. 5 Jan. 1982). *See* preceding paragraph in text and note 11 *supra*. It should also be noted that *Peskin* and *Berrigan* held there was no selective prosecution defense shown because of a failure to show improper motivation, so the courts there need not have decided the selection question anyway.

[106] 613 F.2d at 1003-04.

natory fashion," [107] it also makes sense that the burden be generally on the defendant to show the necessary elements at each procedural stage.

We think even the cases relied on by the district court as support to the contrary bear this out.[108] In *United States* v. *Berrios* the court stated that, before it allowed the requested discovery, it would "require some evidence tending to show the existence of *the essential elements* of the [selective prosecution] defense"—not *an* essential element—and that "the documents in the government's possession would indeed be probative of these *elements*." [109] *Berrios* thus pointed out that defendant there had "not pointed to a single unprosecuted violation . . . on the part of others, even though proof of *this essential element* would not necessarily be in the government's exclusive control." [110] We do not believe the other cases cited by the district court are supportive either. *Berrigan* required a "colorable basis" [111] for the defense, and it seems to us that if an essential half of the defense is not colorable then there is no such "colorable basis." This was, incidentally, exactly the approach taken in *Diggs*.[112] The same is true of the *Oaks* requirement that the claim be taken "past the frivolous stage"; [113] *Oaks*, moreover, required "an initial factual showing" of "impermissible discrimination" [114]—which, in that case's context, sounds like an amalgam of both elements. In *Peskin*, it is our reading of the case that the hearing for defendant's selec-

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[107] *Falk*, 479 F.2d at 620.

[108] *See* note 104 *supra*.

[109] 501 F.2d at 1211 (emphasis added).

[110] *Id.* at 1212 (emphasis added).

[111] 482 F.2d at 177, 181.

[112] 613 F.2d at 1003-04.

[113] 508 F.2d at 1404.

[114] *Id.* at 1405.

tive prosecution claim was denied precisely on the test of no improper motive *alone*. The same is true of *Berrigan*. In the last case relied upon by the district court, *Falk*, while it was held that defendant's selective prosecution claim was not without merit, it was done upon a finding that he had shown *both* elements.[115] Finally, we again affirm that *Diggs* controls for this Circuit.

Defendant argues that it was selected "because of [the government's] hostility to the editorial policy of defendant, and the [Irish Republican] cause it espouses . . . ." [116] But if the question of selection is approached from the standpoint of the political issues involved in Northern Ireland and the defendant's support for one faction in the strife there, one finds that the Attorney General has sought and obtained the registration under FARA of persons representing a variety of political interests ranging from pro-loyalist to pro-Irish Republican.[117] Defendant thus has a difficult though not impossible task to show selection.[118]

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[115] 479 F.2d at 619-23.

[116] Defendant's Answer, J.A. at 6-7.

[117] Indeed, the Attorney General further claims in his brief at p. 9 n.8 that among those registrants are Betty Williams and Mairead Corrigan, founders and leaders of the Community of the Peace People and the recipients of the Nobel Peace Prize for their efforts in Northern Ireland. The identities of all these registrants and their foreign principals are contained in the REPORT OF THE ATTORNEY GENERAL TO THE CONGRESS OF THE UNITED STATES ON THE ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT OF 1938, AS AMENDED, FOR THE CALENDAR YEAR 1979, 386-89 (1980), *reprinted in* J.A. at 151-54. We note that the State Department has been similarly even-handed in its denial of visas to extreme spokesmen on both sides of the Irish question. Hosenball, *Irish Burlesque*, THE NEW REPUBLIC, 3 Mar. 1982, at 10-11.

[118] We do not, however, rule out the possibility that on remand the district court may find adequate evidence of selection and improper motive. We say only that there is no indication in its opinion that it has found any so far.

Note that *all* eligible foreign agents are required to register under the Act, whether the Attorney General brings suit against them or not. Thus, it is not as if the Attorney General's discretion determined that defendant fell within the Act: all that was exercised here was the executive's pure enforcement power.

If the Government has a valid ground to bring this action, then presumptively it has every right and duty to do so. It would be anomalous to allow *The Irish People* to escape the duty to register as a foreign agent solely because registration would create joy in Whitehall or Dublin. The interests of the United States Government are paramount, and if there was actually no selection, then all the correspondence from Britain and Ireland creating an aura of "improper" extraneous motive is beside the point: the first essential element of discriminatory selection has not been established.

## III. The Improper Dismissal Issue

On remand the district court should reanalyze the documents at issue to determine whether, under the principles we have outlined, there remains a colorable showing of selective prosecution.[119] It should look to see whether there was selection and, if so, whether it was improperly motivated. We should also point out that even if the district court makes this finding, dismissal may be an inappropriate remedy for the Government's inability to produce the documents.

In reaching its conclusion that dismissal was proper the district court stated, "It would be inconsistent with

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[119] Defendant contends that, even were the classified materials irrelevant to its selective prosecution defense, they are nonetheless relevant for other defenses. *See* Brief for the Defendant-Appellee at 27-28. It does not appear, however, that the district court has made such a finding so far. And, for the reasons discussed in this section, if such a finding were made it would not necessarily follow that dismissal would be the proper remedy for nondisclosure.

the fundamental fairness required by due process to allow the Government to assert the defendant's guilt and then deny it the materials that might serve to exculpate it." [120] To support this proposition the court cited *United States* v. *Reynolds* [121] and *United States* v. *Andolschek* [122] In the latter case, Judge Learned Hand stated,

> While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess. . . . The government must choose; either it must leave the transactions and the obscurity from which a trial will draw them, or it must expose them fully.[123]

The district court quoted this passage and then concluded that a dismissal of the Government's action was proper in this case.

We disagree. Neither *Reynolds* nor *Andolschek* supports dismissal in this case. *Reynolds* involved a suit by the widows of three deceased civilian observers following the death of their husbands in the crash of a bomber. Plaintiffs sought production of the Air Force's official accident investigation report and the statements of the three surviving crew members. The Government moved to quash the motion, claiming that these matters were

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[120] Mem. op. at 6, J.A. at 117.

[121] 345 U.S. 1, 12 (1953).

[122] 142 F.2d 503 (2d Cir. 1944).

[123] *Id.* at 506.

privileged against disclosure pursuant to Air Force regulations. Nonetheless, the district court ordered the Government to produce the documents in order that it might determine whether they contained privileged matter. The holding was affirmed on appeal, but the Supreme Court *reversed*. The Court stated:

> *Regardless of how it is articulated, some . . . formula of compromise must be applied here.* Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.[124]

The Court took judicial notice of the national security considerations in the case, and pointed out that a balance had to be struck between the competing claims of the two parties, taking into account the *necessity* of the evidence for plaintiff, and the national security considerations of defendants. The Supreme Court then stated:

> There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets. [Plaintiffs] were given a reasonable opportunity to do just that when [the Government]

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[124] 345 U.S. at 9-10 (emphasis added).

> formally offered to make the surviving crew members available for examination. We think that offer should have been accepted.[125]

As for *Andolschek*, which involved a criminal prosecution, the Supreme Court in *Reynolds* distinguished "those cases in the criminal field" [126] from the case that was before them. The Court cited *Andolschek* without approval, and Judge Hand himself carefully limited *Andolschek* to "cases involv[ing] the prosecution of a crime consisting of the very matters recorded in the suppressed document, or of matters nearly enough akin to make relevant the matters recorded." [127] That is not the case here.

Thus we hardly think that either *Reynolds* or *Andolschek* supports dismissal. On the contrary, *Andolschek* implicitly and *Reynolds* explicitly stand for the proposition that courts must balance a number of factors in determining how to proceed when one side or the other has claimed that certain evidence is privileged. Thus, even if defendant would normally be entitled to discovery, it does not follow that, if there can be no discovery in the particular case, dismissal is the only choice available to the court.

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[125] *Id.* at 11.

[126] *Id.* at 12.

[127] 142 F.2d at 506.

We note that defendant argues that it would be especially unfair to allow the Attorney General to proceed with his suit while invoking the state secrets privilege, when, as here, "defendant [is] in a civil enforcement action that may result in criminal penalties as well." Brief for Defendant-Appellee at 19. However, this is irrelevant since we can reach the question of whether the Government's actions necessitate a dismissal of criminal prosecution when and if such prosecution is brought. Moreover, defendant would be subject to criminal penalties only if he chose to violate the statute willfully. *See* 22 U.S.C. § 618(a) (1976).

The parties dispute whether dismissal should be governed by Rule 37 of the Federal Rules of Civil Procedure. On the one hand, plaintiff argues that the Rule explicitly governs the permissible sanctions, including dismissal, for "Failure to Make or Cooperate in Discovery." [128] The district court's 8 August 1980 order requiring the Attorney General to choose between producing the sought documents or suffering dismissal of his complaint does seem very like a production order.[129] On the

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[128] The Rule provides that "the court in which the action is pending may take such orders in regard to the failure [to comply with a production order] *as are just*," and lists several possibilities "among others." Dismissal with prejudice is but one sanction available under Rule 37, and this ultimate sanction is neither greatly favored nor lightly invoked by the courts. Besides *Société Internationale*, the case discussed in the text at pp. 48-49, *infra*, *see Emerick* v. *Fenick Indus., Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976) (dismissal is "a sanction of last resort"); *Dorsey* v. *Academy Moving & Storage, Inc.*, 423 F.2d 858 (5th Cir. 1970); *Anderson* v. *Nosser*, 438 F.2d 183 (5th Cir. 1971), *modified on other grounds*, 456 F.2d 835, *cert. denied*, 409 U.S. 848 (1972); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 376 F.2d 118, 121 (5th Cir. 1967), *cert. denied*, 393 U.S. 815, 859 (1968) ("[t]he dismissal of an action with prejudice is a drastic remedy and should be applied only in extreme circumstances"); *Independent Prods. Corp.* v. *Loew's Inc.*, 283 F.2d 730, 733 (2d Cir. 1960) (concluding, in an analysis of *Société Internationale*, that "[t]he dismissal of an action with prejudice or the entry of a judgment by default are drastic remedies, and should be applied only in extreme circumstances"). *See also Loral Corp.* v. *McDonnell Douglas Corp.*, 558 F.2d 1130, 1133 (2d Cir. 1977); *Gill* v. *Stolow*, 240 F.2d 669, 670 (2d Cir. 1957) (overturning dismissal under Rule 37(d): "general principles cannot justify denial of a party's fair day in court except upon a serious showing of willful default"); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2284 (1970); Annot., 2 A.L.R. FED. 811, 819-22 (1969).

[129] A production order is generally needed to trigger Rule 37(b). *See, e.g.*, 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2282 (1970), and cases cited therein. The Attorney General argues that the 8 August 1980 order was

other hand, defendant argues that the Rules authorize discovery only of information "not privileged," [130] and the documents here have been held, quite correctly, to be so privileged. Still, it seems unduly formalistic to cast Rule 37 aside and create a procedural vacuum in this situation, which seems at the very least closely analogous to that covered by the Rule. .

Happily, this issue is of an intricacy disproportionate to its interest. What is critical is the fact that, whether Rule 37 applies or not, the district court erred in deciding that dismissal is necessarily the proper remedy when information which "might" be relevant to a selective prosecution claim is unavailable for discovery. Whether or not defendant's due process claim is considered under Rule 37 or independently of it,[131] it involves more than simply whether the materials sought "might serve to exculpate" defendant. Certainly the *possibility* of exculpation—if the defense of selective prosecution can be

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"tantamount to a production order," Brief for Plaintiff-Appellant at 12, since it imposed the penalty of dismissal contingent on the continued failure of the plaintiff to produce state secrets—something he clearly could not do consistently with his office and trust. Therefore, he concludes, the sanctions for failure to comply are governed by Rule 37(b)(2). *See Société Internationale* v. *Rogers*, 357 U.S. 197, 207 (1958); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2282 (1970). We note the tension between defendant's assertion that the district court's instruction to the government to produce evidence or drop the suit was *not* tantamount to a production order, and its second assertion that if the evidence is not produced the suit *must* be dropped.

[130] FED. R. CIV. P. 26(b)(1). *See Wehling* v. *Columbia Broadcasting Sys.*, 608 F.2d 1084, 1087 (5th Cir. 1979). *But cf.* note 135 and accompanying text *infra*.

[131] Of course, if non-disclosure would deny defendant due process, then even if Rule 37 supported non-disclosure it could not be allowed. It seems to us, however, that due process is required by Rule 37 itself when it instructs the judge to take such actions as are "just."

said to "exculpate" defendant—must be considered by the court, but other factors must be weighed as well: the *likelihood* that they will serve to exculpate defendant, their *necessity* for the defense,[132] *what defendant stands to lose* in the case, the *government's interest* in maintaining the material's *secrecy* and in successfully *bringing the action*, the *availability of alternatives* to a dismissal-or-disclosure order, and, generally, the parties' respective behavior, cooperation or lack of cooperation, and good or bad faith during the course of the lawsuit.

Even if Rule 37 does not apply, it makes sense to conclude that, in the absence of a specific rule, the court should fashion a remedy which balances the interests of the parties, rather than take a meat-ax approach.[133] Similarly, whether or not Rule 37 applies, the balancing we mandate will be somewhat different from—but just as critical—as in the usual Rule 37 case. In the latter context, courts are typically concerned with balancing the due process claim of a party *resisting* disclosure to his day in court against the court's need to vindicate its

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[132] I.e., the merits of plaintiff's selective prosecution defense can still be adjudicated even if these particular documents are not turned over to it. *See* pp. 53-54 *infra*.

[133] We note that even in criminal cases Rule 16(d)(2) of the Federal Rules of Criminal Procedure states:

> *Failure to Comply with a Request.* If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule ["Discovery and Inspection"], the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

Thus, it is apparent that even in a criminal context the court is to undertake some balancing of the interests and consideration of the circumstances involved.

authority. Here, we are balancing the due process claims of the party *seeking* disclosure against the other party's interest in, inter alia, protecting valid privileges. We also point out that if Rule 37 limits dismissal when material is *not* privileged and there *is* a production order, then certainly if the material *is* privileged and there is *not* a production order—which plaintiff argues makes this a non-Rule 37 case—dismissal should also be limited. Thus, whether or not Rule 37 and the cases decided thereunder apply, they afford at the very least a proper and analogous framework demonstrating that a balancing of the parties' interests must be undertaken, and some of the factors to be considered in striking that balance.

In *Société Internationale* v. *Rogers*[134] the Supreme Court reversed the decision below to dismiss an action when one party failed to produce all the documents requested in discovery. Justice Harlan's opinion stated:

> In our opinion, whether a court has power to dismiss a complaint because of non-compliance with a production order depends exclusively upon Rule 37, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ as well as by authorizing any order which is "just."[135]

The opinion concluded that "Rule [37] allows a court all the flexibility it might need in framing an order appropriate to a particular situation,"[136] thus recognizing the need to weigh the surrounding circumstances. In particular, the Supreme Court recognized as a valid distinction instances where the failure to produce documents was

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[134] 357 U.S. 197 (1958).

[135] *Id.* at 207. Also indicating that Rule 37 governs dismissal even where material is privileged are: *Emerick* v. *Fenick Indus., Inc.*, 539 F.2d 1379 (5th Civ. 1976); *Thomas* v. *United States*, 531 F.2d 746 (5th Cir. 1976); *Independent Prods. Corp.* v. *Loew's Inc.*, 283 F.2d 730 (2d Cir. 1960).

[136] 357 U.S. at 208.

caused by inability on the part of a party, as opposed to willfulness or bad faith. In the discovery here, there has been no allegation of bad faith on the part of the Government. Indeed, plaintiff—like petitioner in *Société Internationale*—turned over several thousand pages of documents to defendant at its request or pursuant to earlier orders by the district court. The district court here had already found, moreover, that the documents plaintiff had were state secrets, and that plaintiff was under no duty to reveal them.[137]

Our recent holding in *Zerilli* v. *Smith*,[138] also seems relevant. That case involved an action by plaintiffs under the Privacy Act and the Fourth Amendment against the Justice Department. Plaintiffs' attempts in the suit to force disclosure of a reporter's sources under Rule 37 were rebuffed, however: "Because we believe that in this case the First Amendment interest in protecting a news reporter's sources outweighs the interest in compelled disclosure, we affirm the District Court's decision to deny the motion to compel discovery." [139] This court noted in *Zerilli* that overwhelming precedent supports a balancing of interests when a privilege is asserted.[140] The court there balanced the two interests, the newspaper reporter's sources and the plaintiffs' interest in compelled disclosure, and concluded that compelled disclosure had the lighter weight. Only if we reduce our interests in national security and the confidentiality of our diplomatic and military communications to less than either a newspaper reporter's sources or compelled disclosure can we justify a dismissal here.

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[137] Other cases recognizing that the lack of bad faith of the defaulting party should be taken in to account include *Emerick*, *Bon Air Hotel*, *Dorsey*, *Anderson*, and *Gill*, cited at note 128 *supra*.

[138] 656 F.2d 705 (D.C. Cir. 1981).

[139] *Id.* at 707.

[140] *Id.* at 711-12.

Similarly, in a case explicitly *denying* the applicability of Rule 37, the Fifth Circuit held in *Wehling* v. *Columbia Broadcasting System* that a district court's dismissal of a plaintiff's action when the defense sought privileged matter from him—precisely the situation here—was improper without a balancing of the parties' respective interests.

> [T]he [district] court should have measured the relative weights of the parties' competing interests with a view toward accommodating those interests, if possible. This balancing-of-interests approach ensures that the rights of both parties are taken into consideration before the court decides whose rights predominate.[141]

In other non-Rule 37 cases—involving, like *Wehling*, claims brought by plaintiffs who then sought during discovery to invoke the Fifth Amendment privilege against self-incrimination—courts have ruled that dismissal is not automatic, that some balancing of the parties' interests is required, and that efforts at accommodation of both sides must be made.[142]

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[141] 608 F.2d 1084, 1088 (5th Cir. 1979) (citing Comment, *Penalizing the Civil Litigant Who Invokes the Privilege Against Self-Incrimination*, 24 U. FLA. L. REV. 541, 547 (1972); Note, *Use of the Privilege Against Self-Incrimination in Civil Litigation*, 52 VA. L. REV. 322, 335 (1966)).

[142] *Black Panther Party* v. *Smith*, 661 F.2d 1243, 1270-74 (D.C. Cir. 1981); *United States* v. *U.S. Currency*, 626 F.2d 11, 14-18 (6th Cir.), *cert. denied*, 449 U.S. 993 (1980) ("Our focus must turn, then, to whether . . . there may be 'a solution which both protects the privilege and permits the . . . case to go forward'," *id.* at 14; "Clearly, appellees should not be compelled to choose between the exercise of their . . . privilege and the . . . subject of this . . . proceeding. On the other side of the coin, however, the government should not be compelled to abandon the . . . action which Congress, by enacting the statute, obviously intended to create. Therefore, the courts must seek to accommodate both the constitutional right against self-incrimination as well as the legislative intent behind the [statute]," *id.* at 15; "Indeed, 'because dismissal is a severe sanction, its use must be tempered,' " *id.* at 16; "There are several

Balancing the relevant factors we outlined earlier[143] seems to us to make the case at hand rather easy. The likelihood of injustice to defendant is small indeed. As we pointed out before, no constitutional rights are threatened, only registration is imminent, no jail sentence looms. The civil/criminal distinction is important, and was emphasized by the courts in both *Reynolds* and *Andolschek*.[144] On the other hand,

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alternatives, short of outright dismissal, which might be appropriate here. The court is of the opinion that the court below, in its discretion, may examine the possible approaches and, perhaps with the cooperation of the parties, select that means which 'strikes a fair balance . . . and . . . accommodates both parties'," *id.*) (citations omitted); *Lyons* v. *Johnson*, 415 F.2d 540, 541-42 (9th Cir. 1969), *cert. denied*, 397 U.S. 1027 (1970).

Finally, it is interesting to note that in *United States* v. *Auhagen*, 39 F. Supp. 590, 591-92 (D.D.C. 1941), one of the first cases brought after FARA's enactment, the District Court for the District of Columbia ruled, in a *criminal* action no less, that defendant's interest in "every reasonable opportunity to make his defense" could not outweigh the fact that the "difficulties involved in taking the deposition [he requested] are very great if not insurmountable."

[143] Pp. 46-47 *supra*.

[144] Note that we are not asserting that dismissal is never proper in a civil context, nor that the hardship undergone by civil parties sued by the Government is necessarily less than that undergone by criminal defendants. However, we do assert that in civil cases especially the proper approach to be taken by courts is one which balances the legitimate interests of both parties, and that the hardship to defendant will generally be less than in criminal cases (here, this is certainly true).

*Cf. Westinghouse Elec. Corp.* v. *City of Burlington*, 351 F.2d 762, 769 (D.C. Cir. 1965) ("There is no logical reason to set up two different privileges, one for civil and one for criminal cases. The defendant in a criminal case may have a greater stake than a party in a civil case, but that would not always be so . . . . The . . . balance should be struck in each case, civil and criminal, in deciding whether disclosure 'is essential to a fair determination of a cause . . . .') (citing *Roviaro* v. *United States*, 353 U.S. 53, 61 (1957)"). *See also* 4 J. MOORE, FEDERAL PRACTICE ¶ 26.61 [6.-4] at 26-317 (2d ed. 1981).

the consequences of revealing the evidence are of the same magnitude as revealing the military secrets in *Reynolds*, a case where the Supreme Court decided to strike the balance on the Government's side. In the district court's earlier memorandum and order sustaining the Attorney General's claim of state secrets privilege, it was held that "disclosure . . . would compromise valuable sources of foreign intelligence and have adverse consequences on the President's ability to conduct the nation's foreign affairs and to protect the nation's security." [145] We have inspected the in camera material and endorse Judge Flannery's appraisal of the consequences of disclosure. We find analogous an observation in a related proceeding in the Second Circuit:

> It seems to the [c]ourt that this may well be an attempt to checkmate the Government's legal quest for information by requiring the presence for interrogation of high level Government officials engaged in one of the Nation's most sensitive security areas. It confronts them with the choice of submitting to the questions of the defendant or, in the alternative, of abdicating its statutory rights.[146]

And, as we have already discussed, the district court's findings do not demonstrate that the material which defendant seeks is relevant, let alone necessary, to the defense.[147] It

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[145] No. 76-1518, mem. op. at 4 (D.D.C. 13 July 1979), J.A. at 50.

[146] *Attorney Gen.* v. *INAC*, 346 F. Supp. at 1389. *See also Loral Corp.* v. *McDonnell Douglas Corp.*, 558 F.2d 1130, 1133 (2d Cir. 1977) ("Courts of equity have the power and duty to adapt measures to accommodate the needs of the litigants with those of the nation, where possible").

[147] *See, e.g., Spiegel, Inc.* v. *FTC*, 494 F.2d 59 (7th Cir.), *cert. denied*, 419 U.S. 896 (1974), where the Seventh Circuit upheld a hearing examiner's quashing of petitioner's subpoenas duces tecum since the court found that "the evidence sought was of no avail to Spiegel." *Id.* at 64. It was held there that

only confirms that the Attorney General is acting with considerations of the national defense, internal security, and foreign relations of the United States in mind—no improper motivation whatsoever. The Government, as we discussed earlier, has been cooperative in the suit thus far, and has an important and legitimate interest in maintaining this lawsuit.

There are, finally, alternatives available to defendant, which will afford the information which would be useful to it at a civil trial, while not impairing the Government's legitimate interests. The Second Circuit has suggested in its opinion *In Re Attorney General of the United States* [148] a procedure which the district court could easily have adopted. There, in overturning a contempt citation of the Attorney General for his refusal to deliver certain informant files to the opposing plaintiff's attorneys, the appellate court directed the trial court to make representative findings of fact from the files which would not compromise the information which the Attorney General asserted was privileged. A similar procedure would have been practical in this case, since due process would not require that the defendant gain actual physical possession of the documents. So long as the defendant is not deprived of the benefit of any of the evidence the documents might contain, in fact, it has lost nothing at all. In *Société Internationale* the Supreme Court noted the availability of a similar remedy and the erroneous refusal of the district court to consider it.[149] The Attorney General himself could be required to make the necessary findings of fact. Finally, rather than put the Government in the dilemma of choosing either to drop its case or turn the

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even if the evidence demonstrated what petitioner said it would demonstrate, it was irrelevant, and that therefore the quashing of the subpoenas could not have been erroneous.

[148] 596 F.2d 58 (2d Cir.), *cert. denied*, 444 U.S. 903 (1979).

[149] 357 U.S. at 203. The Court in *Reynolds* similarly stressed the availability of alternatives to the disclosure sought. 345 U.S. at 11.

state secrets over to defendant, the district court may properly itself delve more deeply than it might ordinarily into marshalling the evidence on both sides for the selective prosecution claim. This investigating is done routinely, for instance, by courts in deciding Freedom of Information Act requests. The district court may also consider other alternatives which the parties suggest.

It is possible, however, that the district court's evaluation of the circumstances will lead it to conclude that we have underestimated the defendant's stake or the necessity of the documents, or that the alternatives we have suggested are impractical, or that in some other way our weighing has been inequitable. If so, the district court should not hesitate to reweigh the factors it deems important and reevaluate the propriety of a dismissal. However, if our analysis above has correctly identified and described the relevant circumstances, we think a dismissal improper.

## IV. Conclusion

The district court erred in its conclusion that defendant is entitled to discovery for the selective prosecution claim. The evidence cited in the opinion does not demonstrate a colorable showing that the Attorney General was improperly motivated. Moreover, a ruling that defendant was entitled to discovery on the selective prosecution claim requires a colorable showing of selection as well as improper motive, and no such finding was made. On remand, the district court should reevaluate in light of today's opinion the evidence which defendant has presented for its selective prosecution defense. Finally we caution the district court that, even if both elements of the selective prosecution claim are sufficiently present to warrant discovery, it does not follow that dismissal is the proper remedy if the material sought for discovery is a state secret. The factual circumstances surrounding the litigation must be borne in mind and a balancing of the interests of both parties must be undertaken.

*Reversed and remanded.*

BAZELON, *Senior Circuit Judge*, concurring: I concur in all but Part II(A) of Judge Wilkey's opinion, and in its result. I also concur in Judge Wald's opinion. In addition, I should only like to add that I do not read Part III of Judge Wilkey's opinion to suggest that the government's "good faith" in cases such as this could ever be a dispositive or even particularly important factor in determining whether or not dismissal is warranted to preserve a defendant's right to due process. *Cf.* Wilkey op. at 46, 52. As Judge Wilkey's opinion points out, one of the ways in which refusing to disclose legitimately privileged documents differs from disobeying a production order is that the latter act—but not the former—implicates the "court's need to vindicate its authority." *Id.* at 46-47. The good faith of the non-producing party is necessarily an important and appropriate factor that courts should consider in the usual Rule 37 proceeding determining sanctions for failure to obey a production order. *See Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958). Whether or not Rule 37 technically applies to the refusal to disclose legitimately privileged documents, however, the appropriate task for a court in *that* context is simply to "measure[] the relative weights of the parties' competing interests with a view toward accommodating those interests, if possible." *Wehling v. CBS*, 608 F.2d 1084, 1088 (5th Cir. 1979). The non-disclosing party's good or bad faith may create objective facts that make "accommodation" more or less feasible. On the other hand, its "good faith" in and of itself should not be used to dilute the due process protection accorded to the party seeking disclosure.

Separate Opinion of *Circuit Judge* WALD, in which *Senior Circuit Judge* BAZELON concurs: I concur in Judge Wilkey's opinion with the exception of Part II, A. I agree that a colorable claim of improper motivation has not yet been demonstrated but cannot entirely accept either his analysis of the legislative history or his comments on constitutionally permissible motivation.

As Judge Wilkey observes, *Diggs* requires that "a defendant alleging or invoking the selective prosecution defense, even at the discovery stage, must offer at least a colorable claim *both* that the prosecution was improperly motivated and that it was selective in the first place." Opinion of Wilkey, J., at 5-6. Here, neither prong of the *Diggs* standard was satisfied. First, the district court declined to rule on the issue of selection "because of the manifest difficulty of finding others 'similarly situated' in the sense of voicing strong and regular opposition to the foreign policy (regarding Ireland) of a major United States ally (Great Britain)." Mem. Op. at 3, J.A. at 114. And second, the court failed to identify adequate factual support for a colorable showing that the present action was prosecuted to "alleviat[e] *political* as well as financial and military support furnished [to] Irish militants by U.S. Citizens." Mem. Op. at 4, J.A. at 115 (emphasis in original). The district court's opinion points only to one witness' statement that "[p]erhaps" the Irish government made such a request. Deposition of Dennis Dickson at 52 (Jan. 30, 1980).

I cannot agree with Judge Wilkey, however, that FARA enforcement may permissibly be focused on one side (*i.e.*, the side currently supported by the Administration) of foreign policy controversies that may be the subject of debate among Americans. Certainly the text of the Act and its legislative history allow the Justice Department to take account of foreign intelligence sources in deciding who is a foreign agent and how dangerous the agent may be and permit use of limited resources to target those alleged agents deemed most dangerous or

powerful (*i.e.*, saboteurs, terrorists). But I resist the notion that the power of prosecution may be used selectively to manage the information put before the American people in debates over foreign policy. In this context, *i.e.*, selectively labelling a newspaper as an organ of propaganda for a foreign agent, issues of *constitutionally* improper motivation surface disturbingly. If the district court were to identify evidence which colorably shows that this newspaper was singled out for enforcement while those expressing views on the other side of the controversy were left alone and "'the prosecution was undertaken with the motive to suppress' protected expression," Mem. Op. at 4, J.A. at 115 (quoting *United States* v. *Peskin*, 527 F.2d 71, 86 (7th Cir. 1975) (en banc)), the defendants would have made the requisite colorable showing of selective prosecution. FARA, evenhandedly applied, has survived constitutional objections, and in fact serves first amendment values by supplementing the information that might otherwise be available to the public. And I concede that, as Judge Wilkey's opinion points out, some unevenness was built into the Act through its congressionally authorized exemptions in the service of compelling interests of national security. But that unevenness may not permissibly be expanded through prosecutorial discretion to discredit views currently in disfavor while withholding the "spotlight of pitiless publicity" from views our government and allies prefer be presented to the American public in more palatable form.

Even were the district court to identify a colorable showing of both elements of a selective prosecution defense, however, there is some question whether the documents at issue are, even under a "liberal" standard, "sufficiently related to that defense to justify compelling the government to release them." Mem. Op. at 5, J.A. at 116. Their relevance must, of course, be considered on remand in light of additional fact findings. But the district court's description suggests the documents record

only communications upon which the Attorney General could permissibly base an exercise of prosecutorial discretion. The existence of such communications would seem to bear only tangentially on the claim that the Attorney General responded to pressure to suppress political support for Irish militants. Such attenuated relevance, even were it sufficient to justify a discovery order, at the very least lessens the value of the documents to the defense and suggests that their unavailability to the defense provides slender support for dismissal.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| ATTORNEY GENERAL OF THE UNITED STATES, | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 76-1518 |
| THE IRISH PEOPLE, INC. | ) | |
| Defendant. | ) | |

Filed: January 4, 1977

MEMORANDUM AND ORDER

This is an action under the Foreign Agents Registration Act, 22 U.S.C. §611 et seq., to require defendant to register as the agent of a foreign principal and otherwise comply with the terms of the Act. Now before the court is defendant's motion to dismiss on the grounds of lack of personal jurisdiction and improper venue. In the alternative, defendant has moved that the action be transferred to the United States District

Court for the Southern District of New York for the convenience of the parties and the potential witnesses.

Defendant is incorporated by the state of New York and has its principal place of business in New York City. Defendant's sole business is the publication of a weekly newspaper entitled The Irish People, printed in the state of New Jersey. All of defendant's books and records are kept at its principal place of business in New York City. All copies of defendant's publication which are sent to the District of Columbia are mailed from New York. All subscription orders are accepted in New York City, and all payments for subscriptions are received in New York City. In short, most of defendant's activities are carried out in the Southern District of New York.

On the other hand, defendant's con-

tacts with this district are relatively few. Of a total of approximately 13,000 copies of The Irish People, only approximately 55 are sent to the District of Columbia. Most of those sent here--a total of about 50--go to members of Congress. Actual revenue derived from distribution in the District of Columbia totals only $100. Defendant is not licensed to do business in the District of Columbia, maintains no office or telephone listing here, and has no employees or assets of any sort here. According to an affidavit from the editor-in-chief of The Irish People, it neither regularly solicits nor regularly receives advertising from the District of Columbia. These facts show that defendant's contacts with the District of Columbia, though they may have occurred on a regular basis, are certainly limited in scope.

In light of these circumstances, defendant contends that this court lacks personal jurisdiction over it. There is, however, a clearly discernible trend in the courts toward expansion of the permissible scope of jurisdiction over foreign corporations and other nonresidents. See McGee v. International Life Insurance Co., 355 U.S. 220, 222 (1957). The starting point for this trend is the decision of the Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), where the Court held that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" The International Shoe Court also observed:

> 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.

Id. at 317.

The decisions of the Supreme Court suggest that it is not necessarily the quantity but rather the quality of the contacts which is determinative of the question of jurisdiction. For example, in McGee v. International Life Insurance Co., supra, due process was held not to be violated by the exercise of jurisdiction over a corporation which had engaged in a single transaction in the forum state, where the cause of action arose from that transaction. As the Court noted in its earlier International Shoe opinion:

> The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state is a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.

326 U.S. at 319 (citations omitted).

The law established in McGee and International Shoe was not altered by Hanson v. Denckla, 357 U.S. 235 (1958). In that case, the Court held that a state had no personal jurisdiction over a trustee and could not, therefore, entertain a suit to determine the validity of the trust. The decision was based, however, on the fact that the trustee had undertaken no acts within the forum and in fact had no connection with the forum. In reaching that conclusion, the Court restated the basic rule from the

earlier cases:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Id. at 253.

Application of the "minimum contacts" test derived from this line of opinions is especially difficult where the defendant is a publisher of magazines or newspapers and is sued on a cause of action arising out of published material circulated in the forum state. Defendant cites several cases holding that minimal circulation in the forum does not by itself satisfy the requirement of "minimum contacts." New York

Times v. Connor, 365 F.2d 567 (5th Cir. 1966); Buckley v. New York Times Co., 338 F.2d 470 (5th Cir. 1964). The rationale of those cases may, however, be limited to newspapers as opposed to magazines and other publications which aim for a wider distribution. Citing "basic differences between the businesses of publishing a newspaper and a national magazine," the Fifth Circuit in Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967), distinguished earlier cases. The Golino court said:

> The existence of a newspaper, no matter how popular, depends primarily upon circulation in the vicinity of its publication. Circulation in other areas may well be welcomed, but it is not critical to the newspaper's continued existence.

Id. at 590. In holding that a national magazine, the Saturday Evening Post, had sufficient contacts with the forum to justify the exercise of personal juris-

diction over its publisher, the court was influenced by the fear that, absent such a holding, "a national publisher would be allowed to insulate itself against suit in every state of the union except the state of publication." Id. at 591.

The facts before the court in this case reveal defendant's publication to be similar to the national magazine involved in the Golino case rather than the newspapers in the cases cited by defendant. The fact that few copies of The Irish People are sent to the District of Columbia is not necessarily dispositive. In fact, when placed in proper perspective, the District of Columbia distribution is not so insignificant as it appears at first blush. While, by defendant's own calculation, District of Columbia distribution accounts for .42% of its total copies, the District

of Columbia forms only about .33% of the national population. This statistical comparison suggests that the District of Columbia forms a relatively significant facet of defendant's scheme of national distribution. In contrast, the magazine in Golino counted less than 1% of its circulation within the forum state, though the state had about 1.5% of the nation's population.

Regardless of the number of contacts, McGee and International Shoe indicate that it is the quality rather than the quantity of the connections with the forum which is important. The material contained in The Irish People appears to transcend local concerns associated only with defendant's principal place of business, the Southern District of New York, and to seek a national audience. Furthermore, it is beyond dispute that defendant's associations with the District

of Columbia have not been haphazard or merely casual; rather they have been intentional and purposeful. The fact that defendant's relatively few contacts with this district are designed to exert maximum influence is reflected in the disproportionately large number of copies of the publication which are sent to members of Congress. And here, as in McGee and later in the Fifth Circuit's decision in Golino, the cause of action arises directly out of defendant's acts in the forum district. Under such circumstances, the exercise of personal jurisdiction over defendant in the District of Columbia does not violate "traditional notions of fair play and substantial justice." See International Shoe Co. v. Washington, supra, 326 U.S. at 316.

Defendant further contends that, even if it is subject to the jurisdictional power of the District of Columbia

courts, venue is not proper in this district under 28 U.S.C. § 1391. That statute provides that venue is proper in an action against the corporation if the corporation is sued in the district where it "is incorporated or licensed to do business or is doing business." The question of proper venue in this case thus depends on whether defendant may fairly be said to be "doing business" in this jurisdiction. Defendant claims that the test for "doing business" is more rigorous than that for personal jurisdiction, while plaintiff argues that the two tests are the same and that, if the court finds that defendant is subject to in personam jurisdiction in this district, the court must likewise find that venue is proper here.

There appears to be a split of authority on this question. For example, the court in Mosley v. Nationwide Pur-

chasing, Inc., 485 F.2d 418, 421 n. 4 (T.E.C.A. 1973), noted in dictum that "[t]his § 1391 test is not necessarily the same as that under a state long-arm statute used to acquire jurisdiction over a foreign defendant." But the court in Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc., 302 F. Supp. 459, 464 (D.D.C. 1969), rev'd on other grounds, 432 F.2d 650, cert. denied, 400 U.S. 965, stated that "[t]he test of jurisdiction and venue is whether a corporation has made its presence felt in a particular area to advance its essential business purposes." A noted commentary on federal practice asserts that the two tests should be the same:

> And, although the matter is not free from doubt, and there is very respectable contra authority, we believe that if a corporation is amenable to service of process it should be held to be "doing business" for venue

> purposes.... If it is not unfair to subject the corporation to the court's jurisdiction by service of process, it seems wise and not unfair to hold that there is a proper venue, particularly when the case can be transferred to another venue, if convenience warrants.

1 Moore's Federal Practice Par. 142[5.1-3] at 1411-13 (2d ed. 1976). It is clear that the "minimum contacts" test of personal jurisdiction is satisfied by the circumstances here presented, and, since this court accepts the theory that the tests for jurisdiction and venue are the same, the court finds that venue is proper here as well. Even if the tests were different, with a somewhat higher showing required for venue than for personal jurisdiction, the intentional acts of defendant within this district would seem sufficient to qualify as "doing business."

Defendant's final contention is

that, even if venue is proper in the District of Columbia under § 1391, the court should transfer the action to the Southern District of New York for the convenience of the parties and potential witnesses. The affidavit submitted by defendant shows that defendant's witnesses, should the matter come to trial, would all be from the Southern District of New York, and, of course, defendant's books and records are maintained there. Under 28 U.S.C. §1404(a), the court is given discretion to transfer an action "[f]or the convenience of parties and witnesses, in the interest of justice." However, the choice of venue is basically plaintiff's, and his choice is entitled to considerable weight. See C. Wright, Law of Federal Courts 190 (3d ed. 1976). Here defendant has not met its burden of showing that the balance of conveniences among

the parties and their respective witnesses requires the transfer of the action to another district.

Accordingly, it is, by the court, this 4th day of January, 1977

ORDERED that defendant's motion to dismiss be, and the same hereby is, denied; and it is further

ORDERED that defendant's motion to transfer this action to the Southern District of New York be, and the same hereby is, denied; and it is further

ORDERED that the parties shall appear before the court for a status conference January 17, 1977 at 9:30 a.m.

THOMAS A. FLANNERY
UNITED STATES JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| THE ATTORNEY GENERAL OF THE UNITED STATES, | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 76-1518 |
| THE IRISH PEOPLE, INC., | ) | |
| Defendant. | ) | |

FILED: JULY 13, 1979

MEMORANDUM

Pursuant to the court's Order of October 31, 1978, the plaintiff Attorney General submitted document indices and supplemental supporting affidavits and memoranda in opposition to the defendant's motion to compel the production of two sets of documents under Rule 37 of the Federal Rules of Civil Procedure. After receipt of the indices, the court conducted an in camera examination of both groups of documents, one of which

contains material withheld under a claim of the state secrets privilege and the other of which contains material withheld under a claim of the informer's privilege. Declining, however, to rule on the motion to compel without a fuller adversarial presentation, the court ordered service on the defendant of sanitized versions of the indices and supporting memoranda and affidavits. Further, the court invited the defendant to submit a supplemental memorandum that would respond to the new submissions by the Attorney General. The court now has conducted a second in camera review of the documents at issue and carefully has considered the arguments of counsel both for and against the production of documents. For the reasons set forth below, the court will grant in part and deny in part the motion to compel.

I. State Secrets Privilege

The Attorney General has invoked the state secrets privilege to justify the withholding of the documents contained in the plaintiff's in camera Exhibit B. In the seminal Supreme Court decision on the state secrets privilege, United States v. Reynolds, 345 U.S. 1 (1953), the Court stated that, in determining whether the Government validly has asserted the privilege, the trial court must be satisfied that there is a "reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." Id. at 10. The Court further held that "even the most compelling necessity cannot overcome" a valid claim of privilege. Id. at 11. Because the state secrets privilege is "absolute," as the Court of Appeals for this Circuit recently

affirmed in Halkin v. Helms, Nos. 77-1922, 77-1923 (June 16, 1978), amended (Dec. 5, 1978), the "standard of review . . . is a narrow one." Id. at 14.

The formal claim of executive privilege asserted by Griffin B. Bell, as Attorney General of the United States, was lodged by way of an affidavit filed on September 13, 1978. In his affidavit, Bell asserts:

> The purpose of this affidavit is to assert a claim of privilege in respect to certain of the materials sought by the defendant. These materials reflect information that either was furnished to the Federal Bureau of Investigation in confidence by intelligence, security or police agencies or diplomatic representatives of foreign governments or was furnished in confidence by the FBI to such agencies or representatives. The release of this information would reveal the nature and extent of the relationships between the FBI and the agencies and diplomatic representatives of certain foreign governments, relationships established with an understanding that they would remain confi-

> dential. The revelation of these relationships in this action will predictably lead to a diplomatic incident or a disruption and restriction of cooperative law enforcement and intelligence relations or both.

Bell Affidavit ¶ 6. In submitting its revised index of claimed state secrets documents pursuant to the court's Order of October 31, 1978, the Government also submitted a supplemental supporting affidavit, classified "Confidential," for the court's ex parte, in camera inspection. The affidavit of William O. Cregar, who is Assistant Director of the Intelligence Division at the FBI Headquarters, sets forth in some detail the harm to national security the Government believes would result if the court were to compel disclosure of the withheld material. The court has examined the indexed materials in camera with a view toward evaluating the concerns expressed in the Bell and Cregar affidavits.

In evaluating the Attorney General's claim of privilege, the court starts with some first principles. The Government has the burden of demonstrating that there is a reasonable possibility that disclosure of the withheld information would reveal military or state secrets inimical to the national security. United States v. Reynolds, supra, at 8-11. How hard a court "should probe in satisfying itself" that the Government has made this showing depends upon the circumstances of the particular case. Id. at 11. Generally, "[c]ourts should accord the 'utmost deference' to executive assertions of privilege upon grounds of military or diplomatic secrets." Halkin v. Helms, supra, at 14 (citing United States v. Nixon, 418 U.S. 683, 710 (1974)). In Halkin, the Court of Appeals also "note[d] that in the analogous context of the national security

exemption in the Freedom of Information Act courts should accord 'substantial weight' to the affidavit of the agency." Id. at 15. The defendant in the case sub judice has argued persuasively that proof of the existence of communications between agencies of the British or Irish governments and American agencies is crucial to its defense of selective prosecution and cannot be obtained from sources other than the documents at issue here. Therefore, the court has not relied simply upon the plaintiff's affidavits in assessing the claim of privilege, but rather has looked at the underlying documents to ascertain if disclosure would jeopardize the national security.

Upon its in camera examination of the indexed documents, the court has determined that the Attorney General's claim of privilege must be upheld. The

defendant contends that the information in dispute is not within the privileged category, because it does not resemble the types of military secrets or highly secret communications modalities at issue in the dozen or so reported cases in this area. In the court's view, however, disclosure of the alleged intergovernmental communications, specifically sought by the defendant in this action would compromise valuable sources of foreign intelligence and have adverse consequences on the President's ability to conduct the nation's foreign affairs and protect the nation's security. This is a sufficient showing under Reynolds to make out a valid claim of the state secrets privilege. See, e.g., Jabara v. Kelley, 75 F.R.D. 475 (E.D. Mich. 1977).

The defendant asserts that the plaintiff has failed to prepare an index

of 250 pages of materials identified by the defendant and sought to be withheld under a claim of the state secrets privilege. The court will order the plaintiff to prepare such an index.

II. Informer's Privilege

In one of its memoranda filed in opposition to the motion to compel, the Attorney General observes that "[u]nlike other aspects of this case there is little disagreement as to the decisional law governing the informant issue." Plaintiff's Memorandum of March 22, 1979, p.2. As the parties recognize, the Supreme Court's analysis of the informer's privilege in Rovario v. United States, 353 U.S. 53 (1957), calls for courts to balance "the public interest in protecting the flow of information [from informers] against the individual's right to prepare his defense." Id. at 62. The Court in Rovario held that the

applicability of the informer's privilege was limited by "the fundamental requirements of fairness," and that "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Id. at 60-61. Although the Supreme Court was concerned with the assertion of the informer's privilege in the context of a criminal prosecution, the Court of Appeals for this Circuit expressly has stated that the Rovario balance should be struck in civil actions as well as in criminal cases. Westinghouse Electric Corp. v. City of Burlington, 122 U.S. App. D.C. 65, 72, 351 F.2d 762, 769 (1965).

The court has examined the documents withheld under the claim of informer's

privilege in the light of the plaintiff's affidavits and memoranda supporting the assertion of privilege, and agrees with the Attorney General that the future flow of information to law enforcement authorities might be jeopardized by disclosure of the deleted material. Yet a finding that the public interest could be affected adversely by release of the documents does not end the court's inquiry. As noted above, the Supreme Court in Rovario rejected the proposition that the informer's privilege is absolute and must prevail regardless of the competing interests of the party seeking disclosure. 353 U.S. at 60-63. The burden is on the party moving for disclosure to show that "disclosure of the informant . . . would override the government's interest in protecting him as a source of information." United States v. Prueitt, 540 F.2d 995, 1004

(9th Cir. 1976), cert. denied, 429 U.S. 1063 (1977).

Considerations of fairness that would mandate disclosure under Rovario arguably are more compelling in cases like the present one in which the party moving for disclosure does not desire to use assertedly privileged material offensively against the government, but rather seeks disclosure in order to defend itself against an action brought by the government. In contending that "the vast majority of the informants possess no information which would bear on the issues of this case," Plaintiff's In Camera Memorandum, p. 2, the Attorney General appears to concede that some informants, if only a few, might possess some information, if only a little, that would be useful to the defendant in the preparation of its defense. But, instead of providing the court with more spec-

ific guidance on this issue, the plaintiff asserts conclusorily that "[i]n each instance the balancing of interests weighs in favor of the protection of the informant." Id., p.3. The court has reviewed the documents withheld under a claim of informer's privilege and has considered the defendant's argument, presented in its second reply memorandum, that the informants whose identities the plaintiff seeks to protect "are an indispensable source of material information and potentially exculpatory testimony." Defendant's Second Reply Statement, p. 23. With respect to two of the withheld documents only, the defendant has met its burden under Rovario of showing that disclosure of the identities of certain informants would be "relevant and helpful" to its defense. The court, therefore, will order the plaintiff to disclose the fol-

lowing deleted information from File 97-5299:

| Document No. | Serial No. |
|---|---|
| 43 | 117 (2 deletions in lines 7 & 8 referring to "enclosed LHM" on p. 1 only) |
| 83 | 229 (deletion on p. 1; all deletions on p. 3) |

The information from documents 43 and 83 indicated above will be released pursuant to a suitably-drawn protective order to be submitted to the court by the parties for its approval.

The court does not find that the defendant has made a sufficient showing for disclosure of any of the information contained in the file entirely withheld under a claim of the informer's privilege.

An appropriate Order reflects the conclusions of the court.

THOMAS A. FLANNERY
UNITED STATES JUDGE

DATED: 7-13-79

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| THE ATTORNEY GENERAL OF THE UNITED STATES,<br><br>Plaintiff,<br><br>v.<br><br>THE IRISH PEOPLE, INC.,<br><br>Defendant. | Civil Action No. 76-1518 |

FILED: JULY 13, 1979

ORDER

Upon consideration of the motion to compel the production of documents and the opposition thereto, and the court having examined the contested documents in camera and having reviewed the entire record, and for the reasons set forth in the court's Memorandum filed this day, it is by the court, this 13th day of July, 1979,

ORDERED that the motion to compel

the production of documents withheld under a claim of the state secrets privilege be, and the same hereby is, denied in its entirety; and it is further

ORDERED that, with the exception of the deletions from documents 43 and 83 described at page 7 of the court's Memorandum, the motion to compel the production of documents withheld under a claim of the informer's privilege be, and the same hereby is, denied; and it is further

ORDERED that the motion to compel the production of the deleted material from documents 43 and 83 described at page 7 of the court's Memorandum be, and the same hereby is, granted; and it is further

ORDERED that the plaintiff shall release the above-referenced deleted material from documents 43 and 83 subject to a suitably-drawn protective

order to be agreed to by the parties and submitted to the court for its approval no later than 14 days from the date of this Order; and it is further

ORDERED that no later than 30 days from the date of this Order the plaintiff shall submit to the court, and shall serve the defendant with, an index and justification statement regarding all materials identified by the defendant that are being withheld under a claim of the state secrets privilege and have not yet been indexed; and it is further

ORDERED that the defendant shall submit any appropriate supplemental pleadings no later than 14 days from the filing of said statement.

THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| ATTORNEY GENERAL OF THE UNITED STATES, | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 76-1518 |
| THE IRISH PEOPLE, INC., | ) | |
| Defendant. | ) | |

FILED August 8, 1980

MEMORANDUM OPINION

Introduction

This case comes before the court on the defendant's motion to dismiss. This is a civil enforcement action brought pursuant to the Foreign Agent Registration Act (FARA), 22 U.S.C. §§611-618. The Attorney General seeks an injunction compelling the defendant, a New York corporation that publishes a weekly newspaper entitled The Irish People, to register as the agent of a foreign prin-

cipal and otherwise to comply with FARA.

In its answer to the complaint the defendant raised several defenses, one of which is that the defendant was unlawfully singled out for prosecution under FARA because of governmental hostility to its editorial policies. The defendant then sought discovery of government materials relevant to this defense, and the government resisted this discovery, asserting its state secrets privilege. After in camera examination of the documents, this court by order of July 13, 1979, upheld the government's claim of privilege. The defendant now moves to dismiss, contending that the government must choose between prosecuting its case and withholding materials critical to a dispositive defense.

Additionally, the defendant contends that it is entitled to dismissal under

Fed. R. Civ. P. 37 on account of the government's refusal to produce some 250 pages of documents that the defendant is allegedly entitled to discover. The plaintiff responds that the documents to which the defendant refers do not exist and never existed, although in a letter of June 16, 1978, plaintiff's counsel indicated that a claim of executive privilege was being asserted with regard to "approximately 250 pages of material" that have never been produced.

The court rejects the defendant's motion under Fed. R. Civ. P. 37: the plaintiff's single reference to some 250 pages is an inadequate basis for assuming that it is unlawfully concealing materials relevant to the case. With respect to the defendant's forced choice therapy, however, the court rules in favor of the defendant: the government must turn over the documents sought or

have its case dismissed.

Discussion

Under the due process clause of the fifth amendment, federal defendants enjoy protection against discriminatory prosecution. Bolling v. Sharpe, 74 S.Ct. 693 (1954); Washington v. United States, 401 F.2d 915 (D.C. Cir. 1968). See also Yick Wo v. Hopkins, 6 S.Ct. 1064 (1886) (under the fourteenth amendment state defendants enjoy protection against discriminatory prosecution). Proseuction is not unlawful simply by virtue of selectivity, however. Oyler v. Boles, 82 S.Ct. 501, 506 (1962) ("[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation"). Rather, to be unlawful the selectivity must be predicated on some unjustifiable standard, id., and a person's exercise of first amendment rights is

precisely such an unjustifiable standard. United States v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972) (the defendant is "entitled to an acquittal if his evidence proved that the authorities purposefully discriminated against those who chose to exercise their First Amendment rights").

Prosecutions being presumptively legal, Comment, The Right to Nondiscriminatory Enforcement of State Penal Laws, 61 Colum. L. Rev. 1103, 1119-20 (1961), bare assertion of discriminatory prosecution is not enough to entitle a party to discovery regarding that defense. Rather the party seeking to raise that defense must make some preliminary showing of entitlement to raise it.

The nature of the required showing is unsettled. Some cases speak in terms of a two-part "prima facie case." See, e.g., United States v.

Scott, 521 F.2d 1188, 1195 (9th Cir. 1975) (involving alleged failure to file income tax forms).

> In order to prevail in this allegation appellant must bear the burden of proving at least a prima facie case. This requires that appellant first demonstrate that others similarly situated generally have not been prosecuted for conduct similar to that for which he was prosecuted. Secondly, appellant must show that his selection was based on an impermissible ground such as race, religion, or his exercise of his first amendment right to free speech.

The present case does not lend itself to such analsysis, however, because of the manifest difficulty of finding others "similarly situated" in the sense of voicing strong and regular opposition to the foreign policy (regarding Ireland) of a major United States ally (Great Britain).

Other cases present general analysis more suitable for the situation at hand.

Some speak in terms of "reasonable doubt" regarding the legitimacy of the prosecution. See, e.g., United States v. Falk, 479 F.2d 616, 620-21 (7th Cir. 1973)(en banc), in which the court stated that the burden shifts to the government to justify singling out a given party for prosecution when that party "alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose...." Other cases speak in terms of the establishment of a "colorable basis" for the defense of discriminatory prosecution. See, e.g., United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973), in which the court stated that the defendant must make "some initial showing that there is a colorable basis for the contention...." Accord, United States v. Peskin, 527 F. 2d 71, 85-86 (7th Cir. 1975), in which

the court stated that what is necessary for "prima facie entitlement to a hearing" on the issue of discriminatory prosecution are facts alleged which colorably showed that the prosecution was undertaken with the motive to suppress" protected expression. Still other cases inquire into whether "enough facts are alleged to take the question past the frivolous stage," United States v. Oakes, 508 F.2d 1403, 1404 (9th Cir. 1974). And in a case similar to the one at hand the United States Court of Appeals for the Second Circuit stated that before a defendant may obtain mandatory discovery of documentary evidence related to the selective prosecution defense, "we would first require some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed

be probative of these elements." United States v. Berrios, 501 F.2d 1207, 1211-12 (2d Cir. 1974).

These tests might vary in their stringency, but in this case the court is satisfied that regardless of the test applied--reasonable doubt, colorable basis, beyond frivolous, evidence tending to show essential elements--the defendant has carried his burden. Particularly significant is the January 30, 1980 deposition of Mr. Dennis Dickson, a former F.B.I. Legal Attache stationed with the American Embassy in London. Dickson indicated that the United States Department was at one time "getting various requests from the Government of Ireland as to what the U.S. was doing to prosecute individuals that were shipping guns, ammunition, that was in violation of the Registration Act...." Dickson Deposition at 50. He confirmed that

at a meeting convened by the State Department, id., apparently on September 26, 1983, id at 47, there was discussion of means of alleviating political as well as financial and military support furnished by Irish militants by U.S. citizens, id. at 52-53. In view of these and other statements in the Dennis Deposition, it would be unreasonable to deny the requested discovery.

The defendant having established entitlement to discovery relating to the defense of selective prosecution, the next issue is whether the particular documents that the defendant seeks to discover are sufficiently related to that defense to justify compelling the government to release them. 1/

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1/ The government also challenges the defendant's need for the documents in
(footnote continued on following page)

What the defendant seeks are documents indicating "when and whether unnamed agencies of the British or Irish governments had communications or dis-

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(footnote continued from preceding page) question, contending that "the Defendant has not even attempted to explore, let alone exhausted, the possible sources of the evidence ...." Statement of Points and Authorities in Opposition to Defendant's Motion to Dismiss, p.3. In its Statement of Points and Authorities in Support of Defendant's Motion to Dismiss, p. 11, the defendant replies that it has "attempted to obtain the requisite information by deposing two former legal attaches attached to the American Embassy in London, and two State Department officers involved in the government's investigation of The Irish People...during the relevant time period. However, in none of these depositions was defendant able to acquire the information sought in document production, and withheld on state secret grounds." The court is persuaded that the withheld documents are the only source of the information sought.

cussions with American agencies, or officers, which might have resulted in, stimulated, or led to the intensification of the investigation by American agencies of these American citizens' activities on American soil and the substance of those communications." Second Reply Statement of Points and Authorities in Support of Defendant's Motion to Compel, p. 9. In order to determine whether these documents are in fact sufficiently related to the defense to justify their release, the court must determine preliminarily what standard of relevance should apply. The cases on point indicate that this standard is a liberal one. In United States v. Reynolds, 73 S.Ct. 528, 534 (1953), the Court stated, "The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice

is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." (Emphasis supplied.) In connection with this passage the Reynolds opinion cites United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944), a criminal case in which the government sought to suppress confidential documents. There Judge Learned Hand commented, "Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant." (Emphasis supplied.) 2/

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2/ Although the present case is a civil enforcement action, the defendant's interests are similar to those of a defendant in a criminal prosecution, because FARA provides for criminal sanctions for failure to comply with its requirements. 22 U.S.C. §618.

Applying the standard of either Reynolds or Andolschek, the court must conclude that the documents sought to be discovered in this case are sufficiently related to the defense of selective prosecution to support their discovery. There is a manifest likelihood that documents reflecting communications between agencies of the Irish and British governments and agencies of the United States would shed considerable light on the existence vel non of at least one lawful basis for the present prosecution. Indeed, as this court stated earlier in this case, "The defendant in this case sub judice has argued persuasively that proof of the existence of communications between agencies of the British or Irish governments and American agencies is crucial to its defense of selective prosecution...." Memorandum of July 13,

1979, p. 3.

The defendant having established entitlement to discovery relating to the defense and having established the relevance of the disputed documents to the defense, the remaining question is whether the government may prosecute the case while at the same time withholding the disputed documents. Both logic and precedent answer this question in the negative. It would be inconsistent with the fundamental fairness required by due process to allow the government to assert the defendant's guilt and then deny it the materials that might serve to exculpate it. See United States v. Reynolds, supra; United States v. Andolschek, supra. In the latter case, Judge Hand stated,

> While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine contro-

versies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess....The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.

142 F.2d at 506 (emphasis supplied).

For these reasons, the government may not continue to prosecute this action while withholding the documents that the defendant seeks to discover.

An appropriate Order accompanies this Memorandum Opinion.

THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE

DATED: 8-8-80

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| ATTORNEY GENERAL OF THE UNITED STATES, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Civil Action No. 76-1518 |
| THE IRISH PEOPLE, INC., | ) | |
| Defendant. | ) | |

FILED August 8, 1980

ORDER

The court having considered the arguments put forth in the briefs of the parties and at the hearing held on March 12, 1980, and for the reasons in the accompanying Memorandum Opinion, it is, by the court, this 8th day of August, 1980,

ORDERED that the government must, within 10 days of receipt of this Order, provide the defendant all documents sought by the defendant and withheld

under the state secrets privilege; and it is further

ORDERED that if, within 10 days of receipt of this Order, the government has not provided the defendant all documents withheld under the state secrets privilege, the defendant's motion to dismiss should be, and the same will at that time be, granted.

THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| ATTORNEY GENERAL OF THE UNITED STATES,<br><br>Plaintiff,<br><br>v.<br><br>THE IRISH PEOPLE, INC.<br><br>Defendant. | Civil Action No. 76-1518 |

Filed November 6, 1980

ORDER

Upon consideration of the plaintiff's motion for reconsideration, and defendant's opposition thereto, and in light of plaintiff's position that it cannot, for reasons of state, produce to defendant documents that the Court has concluded are relevant to and necessary for defense of this civil enforcement action, it is, by the Court, this 8th day of September, 1980,

ORDERED that the motion for reconsideration is denied, and the defendant's motion to dismiss is granted.

THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 81-1035 September Term, 1981
Civil Action No.
76-01518

Attorney General of the United
States of America,

Appellant

v.

The Irish People, Inc.

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FILED September 9, 1982

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BEFORE: Bazelon, Senior Circuit Judge,
Wilkey and Wald, Circuit
Judges

O R D E R

On consideration of appellee's petition for rehearing, filed August 16, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

For The Court

GEORGE A. FISHER, CLERK

By: /s/

Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 81-1035 September Term, 1981
Civil Action No.
76-01518

Attorney General of the United States of America,

Appellant

v.

The Irish People, Inc.

---

FILED September 9, 1982

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BEFORE: Robinson, Chief Judge, Bazelon, Senior Circuit Judge, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg and Bork, Circuit Judges

O R D E R

Appellee's suggestion for rehearing en banc has circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc that

the aforesaid suggestion is denied.

Per Curiam

For The Court

GEORGE A. FISHER, CLERK

By: /s/

Robert A. Bonner
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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|---|---|
| ATTORNEY GENERAL,<br><br>Plaintiff,<br><br>v.<br><br>THE IRISH PEOPLE, INC.<br><br>Defendant. | AFFIDAVIT<br><br>CA No. 76-1518 |

State of New York )
) ss:
County of New York)

MAUREEN ARMSTRONG being duly sworn, deposes and says:

1. I am the Editor-in-Chief of The Irish People, defendant in the instant action. I make this affidavit in support of the defendant's motion to dismiss. I am fully familiar with the facts set forth herein and make this affidavit from personal knowledge.

2. The Irish People, Inc. is incorporated in the State of New York and is a resident of the State of New

York. Its sole business is the publication of a weekly newspaper entitled The Irish People.

3. Its principal place of business is located at 4951 Broadway, New York, New York 10034.

4. The Irish People is printed by the Vanguard Press, located at 1 Evans Terminal, Hillside, New Jersey.

5. The maximum number of copies printed of each issue of The Irish People is 13,000.

6. There are a maximum of 3,500 subscribers to The Irish People of which 2,500 are fully paid for at the subscription rate of $10.00 annually.

7. Of the total press run of 13,000, approximately 50 copies of the paper are mailed to members of Congress. There are a maximum of 5 individual subscribers in Washington, D.C. Thus, Washington, D.C. distribution of the

paper constitutes a maximum of .42 percent of total distribution.

8. All copies of The Irish People destined for Washington, D.C. are mailed or shipped from New York City.

9. All subscription orders are accepted in New York City and all subscription payments are received in New York City.

10. At the present, there is no newsstand or other wholesale distribution of The Irish People in Washington, D.C.

11. Revenue derived from Washington, D.C. distribution constitutes $100.00 of an approximate annual operating expense in excess of $73,750.00. The Irish People neither regularly solicits nor regularly receives advertising from Washington, D.C.

12. The Irish People is neither licensed or authorized to do business

in Washington, D.C., nor does it maintain any office in Washington, D.C. nor is it listed in any telephone or business directory in Washington, D.C.

13. The Irish People has no employees in Washington, D.C. and does not employ as its agents any reporters, advertising solicitors or others permanently located in Washington, D.C. except that from time to time it may accept for publication, without payment therefore, an unsolicited article from a writer residing in Washington, D.C.

14. The Irish People has no assets or bank accounts in Washington, D.C.

15. The Irish People has at no time conducted business within Washington, D.C.

16. All of the books and records of The Irish People, Inc. are located at its principal place of business in

New York.

17. All witnesses with direct knowledge of the operation of the Irish People, Inc. and the publication of The Irish People newspaper reside and work in New York. It would be a hardship for these witnesses to leave their homes, families, and jobs to attend the trial of this action in the United States District Court for Washington, D.C. and would impede their ability to continue publication of The Irish People during the trial.

/s/
MAUREEN ARMSTRONG

Sworn to this 11th day
of November, 1976

/s/
Notary Public

Supreme Court, U.S.
FILED
DEC 29 1982
ALEXANDER L. STEVAS
CLERK

No. 82-875

# In the Supreme Court of the United States

OCTOBER TERM, 1982

THE IRISH PEOPLE, INC., PETITIONER

*v.*

ATTORNEY GENERAL OF THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-875

THE IRISH PEOPLE, INC., PETITIONER

*v.*

ATTORNEY GENERAL OF THE UNITED STATES

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner, a corporation, contends that the district court lacked personal jurisdiction over it, thus barring the government's enforcement action.

On August 16, 1976, pursuant to the Foreign Agents Registration Act of 1938, 22 U.S.C. 611 *et seq.*, the Attorney General filed a complaint that sought to compel petitioner to register as a foreign agent. Petitioner denied that it was an agent of a foreign principal and asserted various defenses, including a claim of selective prosecution (Pet. App. 3-4). In connection with that claim, petitioner sought production of various documents. The district court found that the requested documents were privileged as state secrets (*id.* at 4, 77-83), but it later dismissed the complaint on petitioner's motion on the ground that the withheld documents bore on petitioner's selective prosecution defense

and thus deprived petitioner of an opportunity to present that defense (*id.* at 5, 94-107).[1]

On the government's appeal, the court of appeals reversed and reinstated the complaint (Pet. App. 1-58). Judge Wilkey was of the view that petitioner's selective prosecution claim was groundless and that in any event dismissal was not warranted (*id.* at 1-54). Judge Wald concurred.[2] She considered the documents at issue to bear only tangentially on petitioner's selective prosecution claim and therefore concluded that they would not support dismissal (*id.* at 56-58). In a footnote (*id.* at 6 n.9), the court agreed with the district court that petitioner had sufficient contacts with the district to support the lower court's assertion of personal jurisdiction over petitioner.

Petitioner contends that in personam jurisdiction was lacking because its only contacts with the District of Columbia involved petitioner's circulation in the District of some 50 copies of its newspaper. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision did not finally dispose of the issue of petitioner's obligation to register or even petitioner's selective prosecution claim, but rather merely reinstated the government's complaint and remanded for further consideration by the district court. Petitioner may yet prevail on this claim or on its other defenses to the complaint. If so, petitioner's present contention will be of no further importance. If, on the other hand,

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[1]Earlier, the district court had ruled that petitioner's business had sufficient contacts in the district to enable the court to assert jurisdiction over petitioner (Pet. App. 59-74).

[2]Judge Wald and Senior Judge Bazelon concurred in all but Part IIA of Judge Wilkey's opinion. Senior Judge Bazelon also concurred in Judge Wald's opinion. Judge Wald's opinion and Judge Wilkey's opinion, except for Part IIA, constitute the opinion of the court. Pet. App. 2.

the district court renders judgment in favor of the government and the court of appeals affirms, petitioner then will be able to present its contentions to this Court, together with any other claims it may have, in a petition for a writ of certiorari seeking review of a final judgment against it. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

DECEMBER 1982

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[3]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests one.

FILED
JAN 10 1983
ALEXANDER L. STEVAS
CLERK

No. 82-875

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

THE IRISH PEOPLE, INC.,

*Petitioner,*

—v.—

ATTORNEY GENERAL OF THE UNITED STATES,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR CERTIORARI

CHARLES S. SIMS,
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*Counsel for Petitioner*

January 6, 1983

## TABLE OF AUTHORITIES

Cases: Page

Abney v. United States, 431 U.S. 651 (1977).....3

Beacon Theatres v. Westover, 359 U.S. 500 (1959).....3

Bolling v. Sharpe, 347 U.S. 497 (1954).....3

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).....3

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).....2

Insurance Co. of Ireland v. Companie des Bauxite de Guinea, ___ U.S. ___, 72 L.Ed.2d 492 (1892)..4

Kulko v. Superior Court, 436 U.S. 84 (1978).....3

Land v. Dollar, 330 U.S. 731 (1947)....1

New Orleans v. Dukes, 427 U.S. 297 (1976).....2

Rush v. Savchuk, 444 U.S. 320 (1980)...3

Shaffer v. Heitner, 433 U.S. 168 (1977).....3

Stafford v. Briggs, 444 U.S. 527 (1980).....4

The Conqueror, 166 U.S. 110 (1897).....2

United States v. General Motors Corp., 323 U.S. 733 (1945).....2

Page

World Wide Volkswagen v. Woodson,
444 U.S. 286 (1981).....3

Statutes:

28 U.S.C. § 1254(1).....1, 2

28 U.S.C. § 1254(2).....2

28 U.S.C. § 1257.....2, 3

## REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR CERTIORARI

Respondent's opposition to the petition for certiorari addresses none of the arguments petitioner has presented. Instead, the Solicitor General suggests that the petition should be denied because petitioner's contentions that the district court lacked jurisdiction "are not presently ripe for review." The Solicitor General's position is as devoid of merit as it is devoid of citation to applicable authority -- i.e., entirely -- and can only represent an attempt to avoid review of an indefensible judgment.

The Solicitor General cannot mean that this Court lacks power under 28 U.S.C. § 1254(1) to review this case by writ of certiorari, since it was properly "in the courts of appeals."[1/]

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1/ See, e.g., Land v. Dollar, 330 U.S. 731, 734 n.2 (1947); United States v.
(footnote continued on following page)

Nor is his suggestion any sounder if he is urging that denial of a motion to dismiss for lack of in personam jurisdiction is not ripe for review as a matter of discretion, under what is thought to be the Court's preference for reviewing final judgments even under § 1254(1).[2/] In the last five years alone, this Court has reviewed four cases in precisely the same procedural posture as this case, i.e., denial below of a motion to dismiss for lack of in personam

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(footnote continued from preceding page) General Motors Corp., 323 U.S. 373, 377 (1945); The Conqueror, 166 U.S. 110, 113 (1897).

2/ But see Doran v. Salem Inn, Inc., 422 U.S. 922, 927 (1975) (finality doubtfully a requirement under § 1254(2) but no requirement under § 1254(1)); cf. New Orleans v. Dukes, 427 U.S. 297, 301-02 (1976) (questioning the "continuing vitality" of a "finality" requirement under § 1254(2)" which unlike such jurisdictional statutes as 28 U.S.C. § 1257 and § 1291 has no 'finality' provision in the statute itself.")

jurisdiction. Shaffer v. Heitner, 433 U.S. 168, 195 n.2 (1977); Kulko v. Superior Court, 436 U.S. 84 (1978); World Wide Volkswagen v. Woodson, 444 U.S. 286 (1981); Rush v. Savchuk, 444 U.S. 320 (1980). Since those four cases arose out of state courts, and in holding them reviewable this Court was therefore obliged to find the derees denying motions to dismiss "final" under 28 U.S.C. § 1257(1), the ripeness of the judgment below for review follows a fortiorari.[3/] See also Insurance Co.

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3/ See also Beacon Theatres v. Westover, 359 U.S. 500 (1959)(jury trial); Abney v. United States, 431 U.S. 651 (1977)(double jeopardy); Bolling v. Sharpe, 347 U.S. 497 (1954)(before judgment in the Court of Appeals); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)(statutory rights). We are constrained to note that respondent's failure to cite any of the recent, controlling cases on the sole issue he presents -- the ripeness for review of a denial of a motion to dismiss for lack of in personam jurisdiction -- or indeed to cite these related
(footnote continued on following page)

of Ireland v. Companie des Bauxite de Guinea, ___ U.S. ___, 72 L.Ed.2d 492 (1982)(nonfinal decree upholding jurisdiction reviewed under § 1254).

Perhaps the most striking feature of respondent's opposition to certiorari is not, however, that it is unsupported by any authority or contradicted by all applicable authority; it is rather that it is directly contrary to the position respondent urged (successfully) only three terms ago, in Stafford v. Briggs, 444 U.S. 527 (1980). There, the United States appeared amicus curiae to seek review of two decisions remanding Bivens damage actions for trial on the ground that the district courts lacked personal jursidiction. The government's position there is precisely the position petitioner

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(footnote continued from preceding page) cases or any other authority at all, hardly assists this Court's responsible management of its discretionary docket.

urges here -- save that petitioner here asserts constitutional, not statutory, jurisdictional defects. Such unexplained (and even unnoted) changes of position can do little to deflect the appearance that nothing stands behind the respondent's position here but the mere wish to avoid review and certain reversal.

If petitioner is correct that the decision below violates its right not to be haled into court except where legislatively authorized, and then only within the constraints imposed by the Due Process Clause (and, here, the First Amendment), then compelling it to defend itself in the District of Columbia and to seek review later will mean the loss of its constitutional protection. The substantial time and money which petitioner will be forced to expend for a distant trial are precisely what the Constitution protects it from expend-

ing. Moreover, the government will have been accorded two bites of the same apple -- an entire trial in the District of Columbia, and then, if it prevails and is reversed on the jurisdictional ground on appeal, another in a proper forum. Such oppression, and such unfair advantage, is surely not proper in any case, much less in one involving the First Amendment rights of United States citizens to publish a newspaper free from government supervision and intrusion.

## CONCLUSION

A writ of certiorari should be granted to review, and ultimately to reverse, the judgment below.

Respectfully submitted,

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January 6, 1983